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STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION – IV

William P. Murphy

CROSS-EXAMINATION OF WITNESSES

Earl T. Thomas

LEGAL STATUS OF ZONING IN MISSISSIPPI

Joel P. Walker, Jr.

May 1961

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STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION---IV†

*William P. Murphy**

RATIFICATION BY THE PEOPLE

Rejection of Ratification by State Legislatures.

There is no more dramatic or conclusive proof of the conscious transition from a confederation of sovereign states to a national government than the choice by the convention of the method of ratification of the Constitution. The Articles of Confederation, operative only on the states as such, appropriately had been ratified by the states as such. Article XIII, after declaring that the union created therein should be perpetual, stated that "nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislature of every state." This was the unanimity rule on which had foundered all the efforts to strengthen the Articles. The resolution of Congress in February, 1787, calling for a Convention stated: "Whereas there is provision in the Articles of Confederation and perpetual union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several states, and whereas experience has evinced that there are defects in the present Confederation, as a means to remedy which several of the states and particularly the state of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such convention appearing to be the most probable means

†This article continues a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L.J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959); and 31 Miss. L. J. 50 (1959); and continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L.J. 203 (1960); 32 Miss L.J. 1 (1961) and 32 Miss. L.J. 155 (1961). The footnote references are to FARRAND, THE RECORD OF THE FEDERAL CONVENTION (rev. ed. 1937) in four volumes.

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of establishing in these states a firm national government; Resolved, that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal government adequate to the exigencies of government and the preservation of the Union." This resolution not only limited the purpose of the Convention solely and expressly to revising the Articles, but also contemplated that the method set forth in the Articles for approving amendments should be followed as to any recommendations of the Convention.

The Virginia Plan included a resolution "that the amendments which shall be offered to the Confederation by the Convention, ought at a proper time, or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon." The provision for "assemblies expressly chosen by the people" was of course utterly foreign to the Articles, and there was some support in the Convention for ratification by the state legislatures. This position was essentially the legalistic one that this was the only method which was provided for by the Articles. Thus, when the proposition in the Virginia plan came up on June 5, Sherman said he "thought such a popular ratification unnecessary, the Articles of Confederation providing for changes and alterations with the assent of Congress and ratification of state legislatures."[385] Gerry also expressed opposition to popular ratification. It was strongly defended, however, by Madison, King, Wilson and the younger Pinckney, and was subsequently approved on June 12 by the committee of the whole, six states to three, with two states divided. When this proposal came before the Convention on July 23, Ellsworth and Patterson "moved that the Constitution framed by this Convention be referred to the legislatures of the states for ratification." Arguing in support of the motion, Ellsworth "observed that a new set of ideas seemed to have crept in since the Articles of Confederation were established. Conventions of the people, or with power derived expressly from the people, were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint. To whom have Congress applied on subsequent occasions for further power? To the legislatures, not to the people. The fact is that we exist at present, and we need not inquire how, as a federal society, united by a charter one article of which is that

[385] 1 Records 122.

alterations therein may be made by the legislative authority of the states."[386] Gerry said that he "considered the Confederation to be paramount to any state constitution. The last article of it authorizing alterations must consequently be so well as the others, and every thing done in pursuance of the article must have the same high authority with the article. Great confusion, he was confident, would result from a recurrence to the people."[387] Mason, Randolph, Gorham, Morris, King, and Madison all spoke strongly against the Ellsworth motion, which was defeated, seven states to three. The Convention then approved, nine states to one, the proposal for ratification by assemblies chosen by the people expressly for that purpose.

Examination of the arguments against ratification by the state legislatures and the reasons supporting ratification by conventions of the people conclusively demonstrates that the Constitution, unlike the Articles, was not predicated upon state sovereignty.

Popular Ratification Curative of Lack of Power.

First, there was the question whether the Convention had any power to go beyond amending the Articles and to draft a new Constitution. Although the Virginia Plan described itself as "amendments. . .to the Confederation," it proposed, as we have seen, a fundamentally different governmental system. It will be remembered that on May 30, the day after the Virginia Plan was introduced, Randolph submitted the three basic postulates upon which it was based: "1. that a union of the states merely federal will not accomplish the objects of. . .common defense, security of liberty, and general welfare. 2. that no treaty or treaties among the whole or part of the states, as individual sovereignties, would be sufficient. 3. that a national government ought to be established consisting of a supreme legislative, executive and judiciary."[388] There was never any doubt that what was being proposed was a new organic instrument of government radically different from the old. It is interesting to note that as early as June 5 Madison's notes refer to the Convention taking up proposition 15 "for recommending conventions under appointment of the people to ratify the new Constitutions."[389]

On May 30 General Pinckney "expressed a doubt whether the act of Congress recommending the Convention, or the commissions of the deputies to it, could authorize a discussion of a system founded on different principles from the federal Constitution."[390] And "Mr. Gerry

386 2 Records 91.
387 2 Records 89-90.
388 1 Records 33.
389 1 Records 122.
390 1 Records 34.

seemed to entertain the same doubt."[391] On June 9 Patterson made "some remarks on the nature, structure, and powers of the Convention. The Convention, he said, was formed in pursuance of an act of Congress, that this act was recited in several of the commissions, particularly that of Massachusetts, which he required to be read; that the amendment of the confederacy was the object of all the laws and commissions on the subject; that the articles of the confederation were therefore the proper basis of all the proceedings of the Convention. We ought to keep within its limits, or we should be charged by our constituents with usurpation; that the people of America were sharpsighted and not to be deceived. But the commissions under which we acted were not only the measure of our power, they denoted also the sentiments of the states on the subject of our deliberation. The idea of a national government as contradistinguished from a federal one, never entered into the mind of any of them, and to the public mind we must accommodate ourselves. We have no power to go beyond the federal scheme, and if we had the people are not ripe for any other. We must follow the people; the people will not follow us."[392] And again on June 16 Patterson, arguing in support of his own New Jersey plan, said that he "preferred it because it accorded 1. with the powers of the Convention, and 2. with the sentiments of the people. If the confederacy was radically wrong, let us return to our states, and obtain larger powers, not assume them of ourselves."[393] And Lansing on the same day said that "he was decidedly of opinion that the power of the Convention was restrained to amendments of a federal nature, and having for their basis the confederacy in being. The act of Congress, the tenor of the acts of the states, the commissions produced by the several deputations all proved this, and this limitation of the power to an amendment of the confederacy marked the opinion of the states, that it was unnecessary and improper to go further. He was sure that this was the case with his state. New York would never have concurred in sending deputies to the Convention, if she had supposed the deliberations were to turn on a consolidation of the states, and a national government."[394]

In reply to this charge that the Convention was proceeding ultra vires, a less legalistic approach was taken by some delegates on grounds of necessity and on a distinction drawn between the power to propose and the power to adopt a new system. Thus, Randolph said that he "was not scrupulous on the point of power. When the salvation of the Republic was at stake, it would be treason to our trust, not to propose

391 1 Records 34.

392 1 Records 177-78.

393 1 Records 250.

394 1 Records 249.

what we found necessary."[395] The younger Pinckney "thought the Convention authorized to go any length in recommending which they found necessary to remedy the evils which produced this Convention."[396] Wilson said that "With regard to the power of the Convention, he conceived himself authorized to conclude nothing, but to be at liberty to propose anything."[397] And Hamilton stated that "He agreed moreover with the honorable gentleman from Virginia, Mr. Randolph, that we owed it to our country to do on this emergency whatever we should deem essential to its happiness. The states sent us here to provide for the exigencies of the union. To rely on and propose any plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end."[398]

Mason, Morris, King and Madison went further and sought to justify the course of conduct of the Convention on broader grounds. Mason and Morris frankly conceived the function of the Convention to be extra-legal but thought that approval by the people would validate it. On June 4 Mason said that "I consider the federal government as in some measure dissolved by the meeting of this Convention."[399] On June 20, noting that "the principal objections against [the plan] of Mr. Randolph were the want of power and the want of practicability," Mason affirmed that "There can be no weight in the first as the fiat is not to be here, but in the people."[400] On July 23 Morris put it as follows: "If the Confederation is to be pursued, no alterations can be made without the unanimous consent of the legislatures: legislative alterations not conformable to the federal compact would clearly not be valid. The judges would consider them as null and void. Whereas in case of an appeal to the people of the United States, the supreme authority, the federal compact may be altered by a majority of them, in like manner as the constitution of a particular state may be altered by a majority of the people of the state. The amendment moved by Mr. Ellsworth erroneously supposes that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation."[401] King then stated that "he preferred a reference to the authority of the people expressly delegated to conventions as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new Constitution."[402] Madison, on June 19, noted that "Much stress

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[395] 1 Records 255.
[396] 1 Records 255.
[397] 1 Records 253.
[398] 1 Records 283.
[399] 1 Records 113.
[400] 1 Records 338.
[401] 2 Records 92.
[402] 2 Records 92.

had been laid by some gentlemen on the want of power in the Convention to propose any other than a federal plan."[403] On August 31 he put the answer to this objection in a nutshell. "The people were in fact the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the bills of rights that first principles might be restored to."[404] The position was thus made clear. Since all power was derived from the people, a ratification of the Constitution by an exercise of popular sovereignty would cure any want of original power in the Convention.

Incapacity of State Legislatures to Ratify.

For another thing, the nature of the new government to be created by the Constitution cast doubt upon the power of state governments to ratify it. The state governments, true, had ratified the Articles on behalf of the people of each state. But since the duties and obligations of the Articles rested upon the states as such, and since under the Articles the states remained sovereign, there could be no question of the power of the state governments, representing the sovereignty of their respective peoples, to ratify the Articles. Nor could there be any question of the powers of state legislatures to make alterations in the Articles, so long as the unanimous consent requirement protected state sovereignty. But the government to be created by the Constitution was to be a national government, exercising its great powers directly upon individuals without the intervention of the states. Its laws were to apply to the individual inhabitants of a state, even though that state's representatives might have opposed such laws. And the new Constitution itself was subject to being amended by Congress and three-fourths of the states, any new amendments being binding both on dissident states and their inhabitants. Was it within the competence of the state governments to create such power over their constituents, or was it necessary that such power be granted by the people themselves?

Hamilton raised the question on June 18 and suggested the answer. "It may be said that the states can not ratify a plan not within the purview of the article of confederation providing for alterations and amendments. But may not the states themselves in which no constitutional authority equal to this purpose exists in the legislatures, have had in view a reference to the people at large."[405] When the Convention debated the question of ratification on July 23, others took a similar view. Mason said he "considered a reference of the plan to the authority of the people as one of the most important and essential of the resolutions.

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[403] 1 Records 514.

[404] 2 Records 476.

[405] 1 Records 283.

The legislatures have no power to ratify it. They are the mere creatures of the state constitutions, and can not be greater than their creators. And he knew of no power in any of the constitutions, he knew there was no power in some of them, that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not given up in the constitutions derived from them. It was of great moment, he observed, that this doctrine should be cherished as the basis of free government."[406] King remarked that "among other objections made in the state of New York to granting powers to Congress, one had been that such powers as would operate within the states could not be reconciled to the [state] Constitution, and therefore were not grantable by the legislative authority. He considered it as of some consequence also to get rid of the scruples which some members of the state legislatures might derive from their oaths to support and maintain the existing constitutions."[407]

Madison then stated that he "thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions, and it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not, and in the case of these, a ratification must of necessity be obtained from the people."[408] Thus the consensus was that although the state governments might not be competent to create a national government acting directly upon the people, there was no doubt of the power of the people themselves to create such a government. Its base was to be the sovereignty of the people and not of the states.

Legislative Ratification Inconsistent with National Government.

Furthermore, it was recognized that any system founded on the consent of the state governments could never be anything more than a compact or treaty between sovereign states, and that a national government with supremacy over the states could only be founded on consent of the people. Madison made this point on June 5 when the Virginia Plan proposal first came up. He said he "thought this provision essential. The Articles of Confederation themselves were defective in this respect, resting in many of the states on the legislative sanction only. Hence in conflicts between acts of the states and of Congress, especially where the former are of posterior date and the decision is to be made

406 2 Records 88.

407 2 Records 92.

408 2 Records 92-93.

by state tribunals, an uncertainty must necessarily prevail, or rather perhaps a certain decision in favor of the state authority. He suggested also that as far as the Articles of Union were to be considered as a treaty only of a particular sort, among the governments of independent states, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from the whole obligation. For these reasons as well as others, he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves."[409]

On July 23, in debate on the proposal, Mason observed that "Another strong reason was that admitting the legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding legislatures having equal authority could undo the acts of their predecessors, and the national government would stand in each state on the weak and rotten foundation of an act or assembly."[410] And Randolph noted that "Added to other objections against a ratification by legislative authority only, it may be remarked that there have been instances in which the authority of the common law has been set up in particular states against that of the Confederaton which has had no higher sanction than legislative ratification."[411]

On the same day Madison made the most succinct statement of this consideration. "He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *constitution*. The former in point of *moral obligations* might be as inviolable as the latter. In point of *political operation* there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes in point of expediency, he thought all the considerations which recommended the Convention in preference to the legislatures for examining and adopting it."[412] Only through ratification by the people could there be an express repudiation of a compact or confederation of sovereign states.

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[409] 1 Records 122.

[410] 2 Records 88.

[411] 2 Records 89.

[412] 2 Records 93.

Anticipation of Opposition from State Governments.

Another powerful consideration supporting ratification by the people was of supreme practical importance. This was the expectation that the state governments would furnish the most formidable opposition to the Constitution, and that prospects for ratification would be enhanced if the decision were made by the people themselves. Thus, King on June 5, thought that "A convention being a single house, the adoption may more easily be carried through it than through the legislatures where there are several branches. The legislatures also being to lose power, will be most likely to raise objections. The people having already parted with the necessary powers, it is immaterial to them by which government they are possessed, provided they be well employed."[413] And Randolph on July 23 stated that "One idea has pervaded all our proceedings, to wit, that opposition as well from the states as from individuals will be made to the system to be proposed. Will it not then be highly imprudent to furnish any unnecessary pretext by the mode of ratifying ? . . . Whose opposition will be most likely to be excited against the system? That of local demagogues who will be degraded by it from the importance they now hold. These will spare no efforts to impede that progress in the popular mind which will be necessary to the adoption of the plan, and which every member will find to have taken place in his own, if he will compare his present opinions with those brought with him into the Convention. It is of great importance therefore that the consideration of this subject should be transferred from the legislatures where this class of men have their full influence to a field in which their effort can be less mischievous."[414]

On the same day Gorham said he was "Against referring the plan to the legislatures. (1) Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the legislature who are to lose the power which is to be given up to the general government. (2) Some of the legislatures are composed of several branches. It will consequently be more difficult in these cases to get the plan through the legislatures than through a convention. (3) In the states, many of the ablest men are excluded from the legislatures but may be elected into a convention. Among these may be ranked many of the clergy who are generally friends to good government. Their services were found to be valuable to the formation and establishment of the constitution of Massachusetts. (4) The legislatures will be interrupted with a variety of little business, by artfully pressing which, designing men will find means to delay from year to year, if not to frustrate al-

413 1 Records 123.

414 2 Records 89.

together, the national system."[415] And Williamson stated that "He thought too that conventions were to be preferred as more likely to be composed of the ablest men in the states."[416]

On August 31 Madison said he "considered it best to require conventions; among other reasons, for this, that the powers given to the general government, being taken from the state governments, the legislatures would be more disinclined than conventions composed in part at least of other men; and if disinclined, they could devise modes apparently promoting, but really thwarting, the ratficiation."[417] On the same day Gouverneur Morris said "his object was to impress in stronger terms the necessity of calling conventions in order to prevent enemies to the plan from giving it the go by. When it first appears, with the sanction of this Convention, the people will be favorable to it. By degrees the state officers and those interested in the state governments will intrigue and turn the popular current against it."[418]

Avoidance of Unanimity Rule.

Along with the fear of opposition by the state governments was the realization that if legislative ratification were tied to the unanimous consent requirement of the Articles, ratification would be impossible. As early as June 5 Wilson "took the occasion to lead the committee by a train of observations to the idea of not suffering a disposition in the plurality of states to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few states. He hoped the provision for ratifying would be put on such a footing as to admit of such a partial union, with a door open for the accession of the rest."[419] And Gorham on July 23 observed that "If the last Article of the Confederation is to be pursued, the unanimous concurrence of the states will be necessary. But will any one say that all the states are to suffer themselves to be ruined, if Rhode Island should persist in her opposition to general measures? Some other states might also tread in her steps. The present advantage which New York seems to be so much attached to, of taxing her neighbors by the regulation of her trade, makes it very probable that she will be of the number. It would therefore deserve serious consideration whether provision ought not to be made for giving effect to the system without waiting for the unanimous concurrence of the states."[420]

To obviate this difficulty, the draft of the Committee of Detail

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[415] 2 Records 90.
[416] 2 Records 91.
[417] 2 Records 476.
[418] 2 Records 478.
[419] 1 Records 123.
[420] 2 Records 90.

provided that "The ratification of the conventions of ..... states shall be sufficient for organizing this Constitution." On August 30, when this provision came before the Convention, various proposals were made to fill the blanks with seven, eight, nine, and ten. Carroll "moved to fill the blank 'thirteen,' unanimity being necessary to dissolve the existing Confederacy which had been unanimously established."[421] It is interesting to note the views expressed by Madison and King as indicating their attitude toward state sovereignty. Madison remarked "that if the blank should be filled with 'seven,' 'eight,' or 'nine' — the Constitution as it stands might be put in force over the whole body of the people, though less than a majority of them should ratify it."[422] And King, in response to Carroll's motion, "thought this amendment necessary, otherwise as the Constitution now stands, it will operate on the whole though ratified by a part only."[423] Wilson, on the other hand, stated that "As the Constitution stands, the states only which ratify can be bound. We must, he said, in this case go to the original powers of society. The house on fire must be extinguished, without a scrupulous regard to ordinary rights."[424] To clarify this point, King the next day "moved to add to the end of Article XXI the words 'between the said states' so as to confine the operation of the government to the states ratifying it."[425] This motion, which recognized the state sovereignty which existed under the Articles, carried nine states to one.

Sherman then said he "Doubted the propriety of authorizing less than all the states to execute the Constitution, considering the nature of the existing Confederation."[426] Morris then moved, somewhat inconsistently with his earlier position, "to strike out 'conventions of the' after 'ratifications,' leaving the states to pursue their own modes of ratification."[427] He explained that he "meant to facilitate the adoption of the plan by leaving the modes approved by the several state constitutions to be followed."[428] King objected, stating that "striking out 'convention' as the requisite mode was equivalent to giving up the business altogether. Conventions alone, which will avoid all the obstacles from the complicated formation of the legislatures, will succeed, and if not positively required by the plan, its enemies will oppose that mode."[429] Madison spoke out against this idea, and Gorham and the younger Pinckney

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[421] 2 Records 469.
[422] 2 Records 469.
[423] 2 Records 469.
[424] 2 Records 469.
[425] 2 Records 475.
[426] 2 Records 475.
[427] 2 Records 475.
[428] 2 Records 476
[429] 2 Records 476.

"urged the expediency of 'conventions' for reasons formerly urged on a discussion of this question."[430] Luther Martin "insisted on a reference to the state legislatures. He urged the danger of commotions from a resort to the people and to first principles in which the governments might be on one side and the people on the other."[431] The Morris motion was defeated, six states to four. Then Carroll's motion to fill the blank with "thirteen" was rejected, all the states against except Maryland. The Convention also rejected "ten" and then voted, eight states to three, to fill the blank with "nine."

Confederation Congress Bypassed.

The Convention made one further repudiation of state sovereignty before it completed its deliberations on ratification. The draft of the Committee of Detail, following a similar requirement in the original Virginia proposal, contained a provision that "This Constitution shall be laid before the United States in Congress assembled for their approbation . . ." The difficulty with this proposal was that such approbation by Congress would have to be unanimous, since Congress operated under the Articles, and it was probable that Rhode Island (which was represented in Congress although not in the Convention), Maryland, and New York, or any one of them, would vote against the Constitution. To preclude such an unfortunate occurrence, Gouverneur Morris and the younger Pinckney on August 31 moved "to strike out the words 'for their approbation',"[432] and this motion carried, eight states to three. On September 10 Gerry moved to reconsider this action, stating that he objected to proceeding to change the government without the approbation of Congress, as being improper and giving just umbrage to that body. He repeated his objections also to an annulment of the Confederation with so little scruple and formality," and also "urged the indecency and pernicious tendency of dissolving in so slight a manner, the solemn obligations of the Articles of Confederation."[433]

But Wilson was vigorous in his opposition. "He expressed in strong terms his disapprobation of the expedient proposed, particularly the suspending the plan on the approbation of Congress. He declared it to be worse than folly to rely on the concurrence of the Rhode Island members of Congress in the plan. Maryland has voted on this floor for requiring the unanimous consent of the thirteen states to the proposed change in the federal system. New York has not been represented for a long time past in the Convention. Many individual deputies from other

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4302 Records 476.

4312 Records 476.

4322 Records 559-60.

4332 Records 501.

states have spoken much against the plan. Under these circumstances, can it be safe to make the assent of Congress necessary? After spending four or five months in the laborious and arduous task of forming a government for our country, we are ourselves at the close throwing insuperable obstacles in the way of its success."[434] Gerry's motion to reinstate the words "for the approbation of Congress" was then defeated unanimously, thus preventing an abortion of the Constitution by an exercise of state sovereignty.

CONCLUSION

In the end, thirty-nine of the forty-two delegates who were present at the close of the Convention affixed their signatures to the completed Constitution. Only Randolph, Mason and Gerry refused to sign,[435] and some of the reasons they gave are relevant to the subject of this inquiry. Thus, Randolph, objected to what he called "the indefinite and dangerous power given by the Constitution to Congress,"[436] and particularly to "the general clause concerning necessary and proper law."[437] He protested against "the want of a more definite boundary between the general and state legislatures"[438] and said he "considered it as strengthening the general objection against the plan that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the state powers."[439] Although he said he "had from the beginning. . . been convinced that radical changes in the system of the Union were necessary,"[440] the final product of the Convention's labors was so nationalistic that he was unwilling "to promote the establishment of a plan which he verily believed would end in tyranny."[441]

Mason declared on August 31 that "he would sooner chop off his right hand than put it to the Constitution as it now stands."[442] He protested "the dangerous power and structure of the government, concluding that it would end either in monarchy, or a tyrannical aristocracy."[443] He listed many specific objections, one of which was that "Under their own construction of the general clause at the end of the enumerated powers, the Congress may. . .extend their powers as far as they shall think proper, so that the state legislatures have no security

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[434] 2 Records 502.

[435] Luther Martin returned to Maryland before the Convention ended.

[436] 2 Records 631.

[437] 2 Records 503.

[438] 2 Records 564.

[439] 2 Records 488.

[440] 2 Records 560.

[441] 2 Records 564.

[442] 2 Records 479.

[443] 2 Records 632.

for the powers now presumed to remain to them, or the people for their rights."[444] Another was that "The judiciary of the United States is so construed and extended as to absorb and destroy the judiciaries of the several states."[445] He concluded that "This government will set out a moderate aristocracy. It is at present impossible to forsee whether it will, in its operation, produce a monarchy, or a corrupt, tyrannical artisocracy. It will most probably vibrate some years between the two, and then terminate in the one or the other."[446]

Gerry objected specifically to "the general power of the Legislature to make what laws they may please to call necessary and proper,"[447] and to the fact that "the times, places and manner of choosing representatives were subjected to the General Government."[448] More generally, he alleged that "The sovereignty or liberty of the states will be destroyed, and the judicial will be oppressive."[449]

In truth, the differences between the Articles and the Constitution were enormous. The Articles provided for a compact of sovereign states; the Constitution created a national government operative directly upon individuals. The Articles provided for a Congress which was an assemblage of ambassadors; the Constitution created a national legislature, with nationally prescribed methods of selection and qualifications, nationally compensated and endowed with national prerogatives with respect to such matters as tenure, contested elections, quorum, attendance, discipline, etc. The Congress provided by the Articles possessed relatively few powers; the Congress created by the Constitution was vested with vast and far-reaching powers whose scope and application were indeterminate. Under the Articles, the prohibitions on the states were relatively few; under the Constitution, they were greatly increased. Under the Articles, there was no executive, no judiciary, no means of enforcing the few powers which Congress had or the few prohibitions on the states; under the Constitution, there was a clear cut and comprehensive declaration of the supremacy of national law over state law, with a national executive and a national judiciary as instrumentalities for the enforcement of that supremacy. Under the Articles, amendment required the consent of every state legislature; under the Constitution, states could be bound by amendments without their consent. The Articles were adopted by sovereign states; the Constitution was ratified by an act of popular sovereignty.

As one compares the two documents and as one studies the debates

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[444] 2 Records 640.
[445] 2 Records 638.
[446] 2 Records 640.
[447] 2 Records 633.
[448] 2 Records 635.
[449] 2 Records 635.

in the Convention, one cannot fail to be impressed by the extent to which the nationalist philosophy was reflected in the Constitution, and by the negligible effect of considerations based on state sovereignty. On fundamental principles, there was almost unanimous agreement; as we have seen, the state sovereignty diehards were few. On matters of detail and implementation, there was much disagreement among the nationalists themselves. As noted in an earlier article, there was a nucleus of "advanced nationalists" headed by Madison, Wilson, and Gouverneur Morris. A larger group of delegates we have described as "moderate nationlists" to indicate that although sometimes they agreed with the "advanced" group, they frequently took positions more favorable to state power. The superior intellectual and forensic leadership of the "advanced" group served as a center to which there clustered a group of "moderates" whose composition varied on different questions. Almost invariably, the coalition was numerous enough to carry the vote for the "advanced" position. The outstanding exception to this generalization was, of course, the question of representation.

What may be said of the position of the states in the new scheme of government set forth in the Constitution? The Constitution is crowded with provisions dealing with the states. The states were to serve as electoral districts for members of both houses of Congress. Qualifications for voting for members of the House were to be the same as for the most numerous branch of the state legislature. Senators were to be elected by the state legislatures. The states were to have the initial power to prescribe the times, places, and manner of holding national elections. Congress was given the power to regulate commerce among the several states. The states were to appoint presidential electors. In the event of no electoral majority, voting in the House was to be by states. The amending process was predicated upon the existence of the states. The states were guaranteed their territorial integrity and a republican form of government. The prohibitions on the states demonstrate an a fortiori recognition of state power. In sum, it may be said that the Constitution expressly recognized the existence of the states as geographic and governmental entities possessed of autonomous power, and contemplated their continued existence as essential constituent parts of the system. In their relationship to each other, the states were recognized as separate and independent political units. This was the case under the Articles, and was to continue so that Constitution, as attested by the fact that, where the nature of the Union demanded, the Constitution provided otherwise. Thus, full faith and credit was to be given in every state to the public acts, records, and judicial proceedings of every other state, and the citizens of each state were to be entitled to all privilges and immunities of citizens in the several states. Throughout American constitutional his-

tory judicial literature has referred to "state sovereignty" and "sovereign states" in instances where it is clear from the context that the meaning which was sought to be expressed was (1) the states as geographic and political entities, (2) the autonomy of the state's governmental power, or (3) the relationship of the states to each other.

The term "state sovereignty" has been used in this paper, however, in the context of the relationship of the states to the central government. As was stated in an earlier article, the states were sovereign under the Articles because there was no superior authority, either in law or in fact, to which the states were required to yield; the states were de jure and de facto supreme. In this sense, the record leaves little room for doubt that the Founding Fathers consciously and intentionally abandoned and repudiated a system based on state sovereignty. This conclusion is supported by the comparative analysis of the Articles and the Constitution and the study of the drafting of the Constitution which have been the subject of this chapter. Futhermore, this was the understanding of the delegates themselves. Yates and Lansing left the Convention in July for the very reason that the plan being developed was destructive of state sovereignty. Randolph, Mason and Gerry refused to sign for the reason, among others, that the Constitution was too destructive of state power. And on October 24, 1787, Madison, setting forth his observations of the work of the Convention in a letter to Jefferson in Paris, wrote: "It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States. No proposition was made, no suggestion was thrown out, in favor of a partition of the Empire into two or more Confederacies. It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States."[450]

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[450] 3 Records 131.

CROSS-EXAMINATION OF WITNESSES

*Earl T. Thomas**

GENERAL OBSERVATIONS

It has been said that the two great tests of truth in the courtroom are the sanctity of the oath and the cross-examination. Because of the duality of pressures supposedly exerted by the oath of the witness, namely, the condign punishment visited in the hereafter by our Creator upon the perjurer and his exposure to criminal prosecution while living, it would appear that the taking of the oath by a witness would alone underwrite the truthfulness of his testimony. From my humble experience and study, however, I believe that cross-examination is the greatest touchstone of truth ever devised. My opinion is but shorthand or paraphrase for the conclusion of a modern-day master of the subject[1] that it is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."

While acknowleding its potency in the revelation of truth, we must, in all candor, admit its correlative danger. The exercise of this art produces both thrills – which are sometimes short-lived – and "spills" – which oftentimes spell disaster for the cross-examiners' cause. Consequently, both its acknowledged value, and its concomitant potential danger, should not only serve to intrigue and challenge us, as practitioners, but also admonish us to make a close and continuing study of the general principles which guide us in the use of this tool. Many varied but somewhat similar statements have been made by illustrious masters of the art on this score, as witness: The early American, Rufus Choate, "Never cross-examine any more than is absolutely necessary. If you don't break your witness, he breaks you."; the English barrister, Sir Edward Clarke, "It is a very useful general rule that you should not cross-examine when you cannot contradict."; the Virginia advocate, John W. Daniel, "A lawyer should never ask a witness on cross-examination a question unless in the first place he knew what the answer should be, or in the second place, he didn't care."; and Sir James Scarlett, Lord Abinger, the English great, ". . . much more mischief than benefit generally results from cross-examination."

Admittedly, cross-examination is an art, and not a science. Though science is knowledge, and a principle of science is a rule in art, art is the application of knowledge to practice, and is the skill in using it. The rules of the art at best can be no more than general, and even then with many qualifications according to varying circumstances. No fixed, pre-

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[1]Busch, *Direct and Cross-Examination,* 23 Miss. L.J. 321, 326 (1951).

cise or definitive rules or principles can be enunciated either for the novice or the veteran. Even so, we must admit that the administration of justice is itself relative, and not absolute. After all, as one writer has put it, both the jury and the judge, as triers of fact, arrive at their verdict or judgment based upon the superior probabilities of truth being in favor of the victor.

PREPARATION FOR CROSS-EXAMINATION

A. In General.

Graduation from law school admirably equips one generally to assume the role of the gladiator in the courtroom. This general preparation, however, should be supplemented by studying a good text or texts on cross-examination.

Moreover, even then, your general preparation will be incomplete if you do not study or consider some principles of applied psychology. Pure reason, unfortunately, does not tip the scales of justice in the courtroom. Emotions enter the picture. The courtroom is an arena, and particularly on cross-examination, where the legalist and the psychologist must merge or co-exist in the same person. The great advocate, Montagu Williams, when one inquired as to his profession, replied, "I am by trade a reader of faces and minds." So it is that a successful cross-examiner must be "a reader of faces and minds." A lawsuit is essentially a game of "selling" or persuasion.

Accordingly, the trial lawyer must be acutely aware of the four fundamental or basic devices of persuasion, which are: (1) The "virtue" device; (2) The "poison" device; (3) The "testimonial" device; and (4) The "togetherness" device. These are literally the "triggers of persuasion." The "tone" or "cast" of a suit will quickly settle over the courtroom and affect the jury. When the plaintiff puts on his case, the cross-examiner must be poignantly alert to the fixation, or unfettering, of these trigger devices on the fact-finders.

Then, again, the successful practitioner must remember the efficacy and impact of the five laws of memory, namely, (1) "primacy" — which influences the advocate generally to use his best witness first, and by the same token, should cause the cross-examiner to use his best talents on such witness when tendered to him; (2) "recency" — which prompts the direct examiner usually to use his next-to-best witness last, with a like burden of effort placed upon the cross-examiner; (3) "association"; (4) "vividness" — as to which the cross-examiner is most wary lest a telling blow be made in his exploratory operation; and (5) "frequency" — which causes the direct examiner to have the story repeated by various witnesses, if not more than once by the same witness, and conversely, causes the cross-examiner to seek to avoid such repeti-

tive efforts. It must be recalled that the verdict is not rendered during the trial, but only when the twelve good men finally retire to recall what their memories permit and to consider their verdict in the cloistered confines of the jury room.

B. For the Case at Hand.

In descending from the general to the particular, we now consider preparation for the actual case at hand. After the case has been meticulously canvassed by the lawyer both as to the law and all the facts, then it is that the cross-examiner, as much so as the direct examiner, should prepare in advance of trial an over-all working hypothesis, or, as it is sometimes called, a general "statement of probabilities". Many trial lawyers, particularly young ones, take copious notes as regards the testimony given at the trial. I have observed that the older and more successful advocates take few notes, for they endeavor to listen to every word brought out on direct examination, and if notes be necessary, resort only to skeletal points. The successful cross-examiner, while the witness is on direct, will, consciously or unconsciously, be framing in his mind also an individual or specific "statement of probabilities" for this particular witness. Such a working hypothesis will reflect why it is that the cross-examiner's client, both by immediate and outlying reasons, circumstances or equities, did or did not do as the pleadings claim.

An absolute *sine qua non* of a successful cross-examination is preparation. Trite and axiomatic though this observation is, it can never be over-emphasized. Never be content with a thorough examination of the law and the facts supporting your side, but know your adversary's cause equally as well as you know your own cause. During the trial of a lengthy antitrust case in which I was associated with a particular New York lawyer, who had previously been a partner of the late Chief Justice Charles Evans Hughes, I inquired of him as to the fundamental differences between the methods of approach by Chief Justice Hughes and the late, and as equally learned, John W. Davis, both of whom constantly opposed each other in the most momentous litigation tried in this country during their lifetime. My associate stated simply that the difference was, Charles Evans Hughes knew "all there was to know about the case", whereas John W. Davis knew "all he needed to know about the case". Because none of us can ever acquire the distinction or powers of discernment of a John W. Davis, or of a Charles Evans Hughes, manifestly the best and safest approach to emulate is that of Charles Evans Hughes.

As illustrative of the caveat to be prepared, I refer to a case tried in the Mississippi Delta. The plaintiff, represented by a most profound and thorough lawyer, filed suit against The Pullman Company for personal injuries occasioned by the allegedly negligent maintenance of an upper

berth from which plaintiff fell. The defendant was represented by very able, but in this case unprepared, counsel. After plaintiff had rested, defendant's attorneys then placed on the stand as their first, and supposedly their best, witness, a colored Pullman porter, who proceeded to show that the upper berth was in good condition and that the injuries occured solely through the slightly inebriated, if not drunken condition in which the plaintiff then was. When the witness was turned over to plaintiff's advocate, he, already knowing something of the very voluble and exaggerating qualities of this colored servant, and knowing well likewise the law as regards common carriers, proceeded with a cross-examination which caused the porter finally to state that the plaintiff passenger, when he boarded the Pullman, initially was in such a drunken state as to be "weaving and wobbling." One of defendant's counsel punched the other and remarked that plaintiff's lawyer was making out the defendant's case. The other defendant's counsel, well knowing that plaintiff's lawyer never made out anyone's case except his own, called for a recess, and in the conference room explained to his associate that something was wrong with their case. It finally dawned upon both of them that the astute lawyer representing the injured passenger had taken their own witness and conclusively proved that The Pullman Company owed a duty to him not only to use ordinary, but also "extraordinary," care when they took him on board in his drunken and stupefied condition. Needless to state, the case was settled immediately on defendant's counsel's return to the courtroom.

THE PURPOSE OF CROSS-EXAMINATION, WHETHER TO CROSS-EXAMINE

Long ago, and even now in some circles, it was thought that the sole object of a cross-examination was either to discredit opponent's witnesses or their stories. The celebrated New York advocate, Max D. Steuer, subscribed to this philosophy, saying that the purpose of cross-examination was, "either to destroy the witness or to destroy the story told by the witness."

It is my frank opinion, however, and I believe it to be the general consensus of modern-day advocates,[2] that the *primary* object is its use as a tool for securing admissions of facts supportive or corroborative of the cross-examiner's contentions, with the *secondary* object being that of discrediting the witnesses of the opposition or their stories.

It is by no means every witness who should be cross-examined. Ordinarily, cross-examination is advisable when: (1) There is very evident reason for believing, in a situation where the testimony does no harm, that favorable statements may be procured; (2) There is hope of demonstrating ignorance or prejudice, showing mistake or exposing false-

[2]Wilson, *Common Sense in Advocacy*, 43 A.B.A.J. 600, 603 (1957).

hood; (3) It is necessary to obviate the inference that the testimony is so strong as to frighten off any attack; and (4) Reason exists that general statements may be tempered, or adverse material explained. Otherwise, in my judgment, it would be folly of the worst type to hazard a cross-examination.

If no cross-examination is advisable, then, in addition to protecting the interest of your client by your judicial restraint, the jury also will silently say, "Thank you," when you graciously make the statement at the end of direct examination, "No question."

METHODS OF CROSS-EXAMINATION — MANNER AND DEMEANOR OF THE CROSS-EXAMINER

Basically and for purposes of outline, there are two different methods of cross-examination, namely: (1) The table-pounding, brow-beating, badgering, storming or "power drive" type; and (2) The smooth, gentle and velvet-glove type, which is ingratiating with the witness, though short of being servile or fawning with him. Manifestly, these types are antipodal, and there are, hence, various intermediate shades or gradations according to the temperament and personality of the cross-examiner.

When I started practice, there were two well-known, old and respected practitioners who used the first method, and apparently got by with it, though during the latter part of their lives it would appear that they lost some cases which they should have won. My observation was that these lawyers had established their reputations while the county and area was in its pioneer state, mostly with a rural population who had little opportunity of reading the papers or being currently informed, and the term "Circuit Court" literally meant for them a "Circus Court."

As we know, jurors are constitutionally sympathetic with the witness on the stand. Jurors now are, as a rule, well informed and believe in the rules of fair play. Personally, I see no reason to use the first type, except in the rare instances where the witness is a palpable perjurer, or becomes belligerent in the process of his cross-examination, in which cases the jury might not only excuse, but applaud, you in becoming outwardly — but certainly you will not be so inwardly or in fact — severe and angry with the witness. When the lawyer becomes "mad" or angry, in fact, he does his client a great disservice in the process.

KINDS OF CROSS-EXAMINATION

Assuming a cross-examination advisable, we next inquire what kind of cross-examination should we attempt. For broad categories, here again I believe there are two types: (1) An *actual cross*-examination, in which the cross-examiner, in earnest, conducts a persistent, careful and

searching examination; and (2) An *apparent* cross-examination, wherein the cross-examiner, facing a witness who has testified truthfully and accurately, must make a pretended cross-examination, lest the jury conclude that the advocate knows the witness told the truth. In such apparent, or pretended, cross-examination, the lawyer goes to the periphery or outlying and collateral circumstances or fringes, so that he might not be harpooned by the witness. As illustrative of this latter kind, a skillful advocate in one of our river counties, while defending a colored man charged with assault and battery with intent to kill, and after an eye-witness testified very tellingly and truthfully for the prosecution as to make an actual cross-examination extremely hazardous, proceeded to question this colored chief witness on cross-examination as follows:

> Cross-Examiner: "Now, you state you were visiting your aunt, when you saw this fight?"
> Witness: "Yes, sir."
> Cross-Examiner: "Where did you come from for your visit?"
> Witness: "Cincinnati, Ohio."
> Cross-Examiner: "Cincinnati, Ohio" — the lawyer emphasizing "O-hyoh."
> Cross-Examiner: "How long have you been wearing glasses?"
> Witness: "I have been wearing 'glasses' for some several years."
> Cross-Examiner: "Do you wear 'glasses' for useful or ornamental purposes?"
> Witness: "For ornamental purposes only."

The lawyer, by this pretended, but skillfully directed, kind of cross-examination, had caused the witness to give a pronunciation and assume an air of superiority which the jury did not appreciate, resulting in their prompt acquittal of his client.

THE MATTER OF CROSS-EXAMINATION

Now further assuming the cross-examination will be *actual,* instead of apparent, let us consider for a moment as to the "matter" of cross-examination. The testimony delivered in Court, whether true or false, is largely in three fields, namely, (1) the field of fact, (2) the field of inference, and (3) the field of opinion. It is possible that one single statement by a witness may well be in all three fields, as shown by the following statement of a witness: "I saw Henry Jones tearing out after Joe Sykes running about 20 miles an hour." It is the task of the cross-examiner to determine whether he will strip such a statement into three parts and cross-examine along the weakest or most exaggerated segment or segments. In the quoted statement, that part to the effect that Henry Jones was running is in the field of fact, whereas the observation that

he was running after Joe Sykes is in the field of inference, for cross-examination may reveal that there were a number of people along the same route or in the same vicinity in which Joe was running; and the conclusion as to running at a speed of 20 miles per hour is obviously in the field of opinion.

In the field of fact, you should be sure that the witness is confined to his knowledge of such alleged fact, and not permit him to steal in a factual statement when it is really based on hearsay. In the field of inference, we must acknowledge there are some statements which merge fact and inference so imperceptibly that it is most difficult to keep them separate. As an illustration of testimony in the field of inference, the witness in a criminal prosecution who had testified that the defendant had bitten off the ear of the prosecuting witness was cross-examined as to how and why he knew that such had happened, when he was behind the defendant a few feet away and could not see the actual act of mayhem take place. The witness answered the cross-examiner thus, "Well, while I didn't see him bite it off, I saw him spit it out" [referring to the defendant]. This points up also the folly of pursuing the witness with the iniquitous questions, "why" or "how", or "will you please explain", or the like.

Many and often are the instances where witnesses testify in the field of opinion, both lawfully and otherwise. Such lawful testimony may be from a lay witness, as for example, whether a person is insane or not, and from an expert within the special fields of his alleged competence. In reality, the so-called "character witness" operates in this field of opinion, though he purportedly testifies as to the general reputation of the witness in the community for a particular trait. It is in the field of opinion that expert witnesses largely and usually operate. It has been said many times that the cross-examiner should be most wary and cautious in the cross-examination of expert witnesses. Some cross-examiners refuse to conduct a cross-examination, but rely solely on making counterproof by their own expert witnesses. Though it may be an instance of where "fools rush in where angels fear to tread", it has been my personal observation and experience that if the cross-examiner will study thoroughly his entire case, including works in the fields of special competence by experts, and consult with his own experts, he should know where fertile fields of opportunity for cross-examination might lie, and accordingly conduct an actual or real cross-examination.

About three months ago, I was requested by General Counsel of R. J. Reynolds Tobacco Company to come to New Orleans and listen to the trial of a lung cancer case allegedly caused by smoking cigarettes, brought by the widow of the deceased against this Company and another. Among other very capable counsel, representing the parties, the

plaintiff was represented by Melvin Belli, and defendant Reynolds Company by Theodore Kiendl, respectively two of the greatest trial lawyers in America. The testimony was practically altogether in the fields of expert evidence, with cancer experts from all parts of the country testifying pro and con. I noticed that these two great advocates did not hesitate to conduct a persistent, rigorous and actual cross-examination of each and every expert, for it was apparent that the lawyers knew practically as much about cancer as the experts. Many favorable admissions were obtained by each lawyer regarding his particular cause.

As for expert witnesses, both the direct and cross-examiners usually want such expert to convert or reduce technical terms in language easily understood by the lay jury. It has been my personal observation that the more expert a witness is, the more he uses such commonly understood terms, and in direct proportion, the less qualified an expert is, the more he resorts to esoteric jargon. I recall an instance, when I was District Attorney, where my adversary called upon a young doctor, who was engaged in the Health Service, to examine the defendant and testify as an expert as to his being insane. He placed the doctor on the stand, and after showing that he had examined the defendant while in jail, the doctor testified on direct as follows:

> Examiner: "Now, doctor, will you please tell us what condition you found the defendant in?"
>
> Witness: "Well, I ascertained that he had a definite type of psychosis."
>
> Examiner: "Doctor, you'll have to break that language down for us common people — what do you mean?"
>
> Witness: "By that I mean that he had a catatonic type of dementia praecox."

Whereupon the examiner in disgust said, "Doctor, you will step aside; we can't understand you"; and sensing the reaction of the jury, I obliginly replied, "No questions."

Certainly, the expert, pseudo or real, is no person on whom the cross-examiner should attempt any sarcastic or sardonic humor. As a matter of fact, it is quite unwise, for many reasons, for any cross-examiner to make an excursion in this deadly field of satire. I am thinking of an incident where a very able, but satirically inclined, advocate saw fit to unleash some sarcasm on a doctor from another state, who had long since retired from the actual practice and was largely engaged in the avocation of racing boats on the Mississippi River, who happened to testify in a personal injury case. Inasmuch as the direct examiner, either wittingly or unwittingly, had simply shown that the witness was a practicing doctor, without giving his qualifications, our satirical colleague "waded in" as follows:

Cross-Examiner: "Doctor, as a matter of fact, you have not practiced medicine for many years?"

Witness: "Yes, sir, that is correct."

Cross-Examiner: "You spend most of your time being a playboy, don't you, racing boats on the Mississippi?"

Witness: "Well, I disclaim being a playboy, but will admit to my love of boats."

Cross-Examiner: "Doctor, as a matter of fact, you simply obtained your M.D. and did not go into any specialty for your engagements in the actual practice?"

Witness: "Well, I spent a good bit of money in taking a year's study at John Hopkins, after I obtained my M.D., and thereafter spent two years at Vienna, Austria."

Cross-Examiner: (Obviously taken aback by this statement) "Well, doctor, I believe you know everything."

Witness: "No, sir, I'm not fortunate enough to be a lawyer!"

CLASSIFICATION OF WITNESSES

Thus, with the advocate being "by trade" a reader of faces and minds, or an applied psychologist, it is a "must" that the cross-examiner particularly be able to evaluate and classify witnesses. There are many categories in which witnesses can be placed, none of which are mutually exclusive. The general categories or classes of witnesses are as follows: (1) The perjured and honestly mistaken; (2) The artful and artless; (3) The voluble and reticent; (4) The nervous and stupid; (5) The positive and indecisive; (6) The contentious and agreeable; (7) The male and female; and (8) The professional and non-professional.

Even if the groups were mutually exclusive, we would still find shades or gradations in a single group. It is the challenging, but nevertheless intriguing, task of the cross-examiner to appraise a witness, preferably in advance in his preparation of the lawsuit, or certainly on the witness stand while he testifies on direct, because witnesses obviously must be treated differently according to the exigencies of the case.

Before discussing the two classes of witnesses which we believe to be all-encompassing of all witnesses who appear on the stand, we pause for the moment to say a word about women, as witnesses. When I began the practice of law, the older members of the Bar gave me the admonition, so often declared in the traditional textbooks on Cross-Examination, "Never cross-examine a woman!" Suffice it to say, in my thirty-one years at the practicing bar, I have seen this caveat practically disappear. The warning, however, does still possess some validity in that it should serve to remind us that, though chivalry has been badly mangled in the economic and political processes through the years, the female witness should be treated with respect, gentility and kindness. It is a very, very rare case where cross-examination of a woman should be

pitched along the lines of discrediting her. Rather, the cross-examination should proceed along the lines of securing favorable admissions — being content if necessary, with only "crumbs from the table" — or discrediting her story.

Two categories of witnesses which should embrace generally all witnesses indicating an *actual* cross-examination in order to ferret out the error of their testimony are (1) the perjured or subjectively untruthful witness, and (2) the mistaken witness, or the witness in error.

A. The Perjured or Subjectively Untruthful Witness.

The lay public is wont to attribute perjury to a witness or a set of witnesses where his or their testimony in the case is contradictory to the testimony of the cause which such public espouses. While perjury is committed often in the courts, in fairness it must be said that perjury is not as rampant as the public might believe. The majority of witnesses, who should be subjected to an actual cross-examination, are those witnesses who are honestly mistaken, or given erroneous testimony through ignorance, prejudice or mistake. Suffice it to say, perjury is sufficently existent that the advocate should be alerted to the earmarks thereof and by his skill and ingenuity seek to discredit him or his story.

Perjury, as we know, is the willful and corrupt swearing falsely to any material matter in the case. The layman is likely to equate perjury to the Biblical injunction, "Thou shalt not bear false witness against thy neighbor." This was uppermost in the mind of the colored witness who appeared on the witness stand in behalf of his friend, the defendant, in a criminal case, endeavoring to foist great hunks of perjury, when the prosecuting attorney on cross-examination inquired, "Well, Mose, don't you recall that the Good Book says that 'Thou shalt not bear false witness against thy neighbor'?" The colored man quickly replied, "Yes sah, Boss, I know dat, but I'se not bearing *against* my neighbor, I'se bearing it *for* my neighbor." A possible distinction without a difference!

General, but not universal, badges or earmarks of perjury which the cross-examiner should watch for on direct examination preliminary to his prospective cross-examination are the following: When the witness: (1) Manifests much zeal on behalf of the party calling him; (2) Is forgetful of facts which he knows may be contradicted; (3) "Balloons" or exaggerates circumstances; (4) Proceeds with his answer without waiting to hear the question; (5) Remembers facts very minutely which he knows are not open to contradiction; (6) Reluctantly gives adverse testimony; (7) Replies flippantly or evasively; (8) Seeks additional time to consider the effect of his answer by using such devices as pretending not to hear the question; (9) Demonstrates indifference; and (10) Often protests his honesty, vows before God, and the like. For general

purposes when a witness exhibits two or more of these earmarks, his testimony is indicative of insincerity and falsehood, and the cross-examiner is fully justified in utilizing his best talents to unseat the witness or unearth and exhibit the error and falsity of his testimony. Whereas order is the rule in direct examination, its converse or opposite, *disorder*, is the indicated procedure for the cross-examination of the perjurer, regardless of whether he be of the artless or pathological type, or the cunning and artful type. As a rule, never let him return to the chronological sequence of his story, unless you can hoist him on his own petard by exhibiting one or more statements in his handwriting wherein he has testified exactly to the contrary. Moreover, rapidity and mobility in questioning should characterize the cross-examination, for the reason that the witness, thus discommoded, both by your disorderly approach and speed of your questions, has no time to make his answers consistent. Additionally, give him ample opportunity to exhibit the various earmarks of perjury heretofore pointed out. If he is addicted to exaggeration, as most likely he will be, permit him to enlarge his exaggerations, and then, by a quick change of pace, suggest some comparison that will clearly exhibit to the witness himself the falsity of his statements. Unless the perjurer eventually gets in the proverbial corner from whence there is no escape, it is best never to ask him the oft-fatal question, "Why?" or "How do you explain?", or the like, for his diabolical cunning or ingenuity may unhorse you. Another very important point to remember in the cross-examination of the perjured witness is the advisability of demonstrating at the earliest point practical in the cross-examination the motive, or likely motive, for the story he has thus fabricated. Jurors are not likely to believe that a witness will testify untruthfully, or exaggerate, unless he has some reason for doing so, for, even an untruthful man will not usually lie without a motive. Many are the cases where intimacy in business or social contacts, a unity of belief or interest, kinship, enmity, or the like, afford rich backgrounds for explorations conducted in this regard. Then, too, there are the more subtle motives, which influence not only perjured, but honestly mistaken, witnesses to testify in a case, namely, where class is arrayed against class, as landlord against tenant, capital against labor, one neighborhood faction against the other, or similar social, political or economics groups antagonistic to the other.

B. The Mistaken Witness, or The Witness in Error.

In conclusion, let us now consider the mistaken witness, or the witness in error — which class, by far, affords the most numerous of witnesses appearing in our courts justifying the skills of the cross-examiner in unearthing error. Objectively, it may well be said that the impact of

undiscovered error is the same, whether it proceed from the mouth of the perjurer or the honestly mistaken witness. Subjectively, however, whereas the one is venal and corrupt, the other is honest and honorable, though he might be actuated by ignorance, prejudice or mistake. This subjective difference, you can be sure, pays off at the "box office," the jury, when the perjurer is unmasked by the cross-examiner.

In cross-examining the mistaken witness, or the witness in error, it is a requisite that the cross-examiner must well know and appreciate the four basic sources of error which inhere in this type witness. These sources are in the fields of: (1) Sensation, (2) Perception or Interpretation, (3) Recollection, and (4) Testimonial Deliverance or Narration.

In discussing the first source of error, occurring in the field of sensation, we must remember that we are initially endowed by our Creator at birth with the basic senses of sight, hearing, smell, taste and touch. We may be unfortunately or defectively thus endowed in one or more respects, wholly or partially, e.g., either totally blind or color-blind. Our progress through life may be accompanied by the loss, or partial loss, of one or more of such senses. Moreover — and this is a rich field for the cross-examiner — though one be possessed of all of his five senses, he could have been "up with the boys" the night before, or deeply agitated over a personal problem or otherwise, at the time the sudden event occurs concerning which he is to testify. It is well always for the advocate to remember that there is "many a slip twixt cup and lip" as between the actual occurrence and that detected or received through the senses of the prospective witness.

For the second source of error, we advert to the sensation thus received by the potential witness and the mental processes which ensue to cause him or her to perceive or interpret the same, that is, in the field of perception or interpretation. Here it is that the age, educational qualifications, the inborn and acquired prejudices, the agile or slow powers of reaction, and a myriad of qualities come into play. Here it is where fact, or alleged fact, blends with inference to form a total mental image or conclusion.

The third source of error is in the field of recollection. Human beings have varying types of memories, some with a keen, and others with a poor or dull, memory, with many intermediate grades in the hiatus. Additionally, in this process, passage of time accompanied by the ravaging influence of imagination enters to color or distort the picture. These infirmities of the human mind should serve to elicit or beckon a careful, but thoroughly exploratory operation by the cross-examiner to uncover the testimonial error which inheres in the honest, but mistaken, witness.

The fourth and concluding source of error is in the field of testi-

monial deliverance or narration. Even though our populace in this state profess to speak the English language, we know very well that evident disparities constantly appear in daily communications in the words or language used and the thought intended to be conveyed. Each of us, almost daily, is a witness to this source of error, and as successful cross-examiners, we must be prepared to deal with semantic differences in unmasking the witnesses's error.

CONCLUSION

In summary, I wish to state that cross-examination is, in my opinion, the highest of the arts which an advocate can practice. A close and continuing study and cautious application of the principles of the art is a must for the successful practitioner. Cross-examination, as the rapier of Laertes, in the hands of the judicious and skillful, can inflict a mortal wound on the opposition, but through careless use or incautious abuse in the forensic exchange, can as well dispatch the one who attempts it.

LEGAL STATUS OF ZONING IN MISSISSIPPI

*Joel P. Walker, Jr.**

LEGISLATIVE HISTORY

The standard zoning act was enacted in Mississippi in 1924 in substantially the same form we find it today.[1] The use of zoning and planning was limiting to municipalities with a population over five thousand. The legislature re-enacted the standard zoning act in 1926 in substanially the same form used in 1924. The only change was a provision authorizing the board of supervisors in coast counties to use the law.[2] In 1938 the population limit was reduced to fifteen hundred.[3] In 1946 it was reduced again to one thousand[4] and in 1958 all limit was removed, so that today all municipalities may use the zoning laws.[5] In 1956 a major step was taken by the legislature when it opened the field of zoning and subdivision regulation to boards of supervisors acting for the entire county outside of incorporated areas and provided a means of financing the use of the laws.[6]

CONSTITUTIONALITY

In 1926 the question whether modern zoning laws were valid under the Constitution of the United States was settled.[7] The attack was made under the 5th and 14th amendments. State courts rapidly came over to the acceptance of the new idea of zoning and today in all states the concept of zoning is approved.[8]

The constitutionality of zoning was first squarely presented to the

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[1]Miss. Laws 1924, ch. 195, at 283 (compare with Miss. Code Ann. §§ 3590-3597 (1956)).

[2]Miss. Laws 1926, ch. 308, § 1, at 430.

[3]Miss. Laws 1938, ch. 333.

[4]Miss. Laws 1946, ch. 292, at 465.

[5]Miss. Code Ann. § 3590 (Supp. 1960).

[6]Miss. Code Ann. § 2890.5 (Supp. 1960). Other laws pertaining to zoning not discussed are: Airport Zoning, Miss. Code Ann. §§ 7544-01 — 7544-17 (1956); Housing Authority, Miss. Code Ann. §§ 7295 — 7322-06 (1952); Urban Renewal, Miss Code Ann. §§ 7342-01 — 7342-20 (Supp. 1960); State Planning, Miss. Code Ann. § 8936.02 (Supp. 1960); Building Codes, Miss. Code Ann. §§ 3374-80, 3374-140 (1956).

[7]Euclid v. Amber Realty Co., 272 U.S. 365 (1926). *Accord*, Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U. S. 16 (1928).

[8]Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951); 58 Am. Jur. Zoning § 14; 101 C. J. S. *Zoning* § 15; Metzenbaum, Law of Zoning ch. VIII (2d ed. 1955).

Mississippi Supreme Court in 1932 in *City of Jackson v. McPherson.*[9] McPherson applied for a building permit for a service station in a residential zone and upon its denial sued the city. Justice Griffith conceded that a few years before a contrary result would have been reached by the court and reviewed *Euclid* and other cases. In his decision he gave the social reasons for zoning[10] and held zoning to be constitutional under the police powers.[11] Since that decision the constitutionality of zoning in Mississippi has not been seriously questioned. The constitutionality of the 1956 county zoning law has not yet been tested in the Mississippi Supreme Court.

COURT INTERPRETATIONS OF STATE LAWS

There have been only nineteen cases in Mississippi construing zoning laws and ordinances[12] and all were decided since 1924. Twelve of these cases have been decidede since 1950 so it is apparent that there have been few cases from which to ascertain the present legal status of the state's zoning laws.

The supreme court, in 1927 in *Dart v. City of Gulfport,*[13] in a decision based on a play on words, held that the zoning act did not permit a municipality to prohibit construction of a building, but only permitted it to regulate and restrict. This was the first case to involve the new zoning act and indicates the reluctance of the supreme court at that time to give the statute the force it would later acquire. This ruling that the state law only permits regulation and restirction and not prohibition has not been followed since the *McPherson* case in 1932. More recent decisions have approved prohibitions in local zoning ordinances.[14] In 1958 in *Ballard v. Smith,*[15] the court said *Dart* was no longer to be followed insofar as it said a municipality could not prohibit certain types of construction. The court, however, has retained judicial review over zoning actions as to the reasonableness of the action when applied to a particular factual situation. Most of the cases today involve the

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[9]162 Miss. 164, 138 So. 604 (1933). Cases involving the same lot were before the court in Fitzhugh v. City of Jackson, 133 Miss. 589, 97 So. 190 (1923) and City of Jackson v. McPherson, 158 Miss. 152, 130 So. 287 (1930).

[10]City of Jackson v. McPherson, 162 Miss. 164, 175, 138 So. 604, 605 (1932).

[11]*Contra,* Fitzhugh v. City of Jackson, 132 Miss. 585, 97 So. 190 (1923) (decided before the 1924 law).

[12]Three other cases deal with appeal procedure only. Reed v. Adams, 237 Miss. 333, 111 So. 2d 222 (1959); Koestler v. Dallas Tank Co., 234 Miss. 104, 105 So. 2d 621 (1958); City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1932).

[13]147 Miss. 534, 113 So. 441 (1927).

[14]Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958); Mayor and Aldermen of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957); Holcomb v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 281 (1953); Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951).

[15]234 Miss. 531, 107 So. 2d 580 (1958).

question of reasonableness as applied to particular facts.[16]

In *Bradley v. City of Jackson*[17] the court indicated that in the exercise of its police power a municipality acts in a governmental and not in a private capacity and is not liable for torts of its officers in attempting to carry out ordinances and regulations, such as zoning regulations, adopted pursuant to such powers.

A. Adoption.

The state zoning law sets forth the procedure by which a municipality may adopt a zoning ordinance.[18] The county zoning law also provides a procedure for counties to adopt such ordinances.[19] Because this procedure is plainly set forth, only a few cases which have involved adoption of a zoning ordinance by municipalities will be mentioned.

The law requires that fifteen days notice be given the public.[20] In the *Brooks* case[21] the court held that the notice must give the name of the municipality and the time and place of the hearing, and that such omissions invalidate any subsequent action. These requirements also apply to changes or amendments to the original ordinance.

In *Morris v. Columbia*,[22] the city authorities gave notice of intention to adopt a zoning ordinance and after the hearing instructed the city attorney to draw up the ordinance. The court held this would not be permissible. The ordinance must be drawn and presented with the comprehensive plan prior to the hearing.

In *Walker v. Biloxi*[23] a question was raised about the procedure that had been used in adopting the zoning ordinance in 1940. Proof showed thirty-two amendments since the original adoption; over seven thousand permits issued; general acceptance and recognition; and other facts. In this case the court held the litigant estopped from raising the question because of the long passage of time; holding that laches, estoppel, and waiver operated under the circumstances.

Further, on adoption, the court held in *Ballard v. Smith*[24] that the mayor and clerk must sign the minute book after adopting a zoning

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[16]City of Hattiesburg v. Mercer, 237 Miss. 423, 115 So. 2d 165 (1959); City of Hattiesburg v. Pittman, 233 Miss. 544, 102 So. 2d 352 (1958); Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958); Mayor and Alderman of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957); Holcomb v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 281 (1953); Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951).

[17]153 Miss. 136, 119 So. 811 (1928).

[18]MISS. CODE ANN. § 3593 (1956).

[19]MISS. CODE ANN. § 2890.5 (Supp. 1960).

[20]MISS. CODE ANN. § 3593 (1956).

[21]Brooks v. City of Jackson, 211 Miss. 246, 51 So. 2d 274 (1951).

[22]184 Miss. 342, 186 So. 292 (1939).

[23]229 Miss. 890, 92 So. 2d 227 (1957).

[24]234 Miss. 531, 107 So. 2d 580 (1958).

ordinance; and, failure to do so would invalidate the ordinance. This case also held the law did not provide a method for identifying and validating the zoning map, and it was sufficient if marked "filed," with the date of filing by the clerk. The court held it was necessary either to set out the boundaries of the various zones or districts in the ordinance or identify them by a map which was kept available for inspection. If this was not done the ordinance was faulty for lack of description.

In *Berry v Embry*[25] the court said where territory was not included on the zoning map, as where there had been an annexation not followed by a revision of the ordinance or map, the annexed territory was not automatically covered by the zoning regulations. The comprehensive plan must be amended to take in the annexed area if it is to be governed by the regulations. The court found that building codes, sanitary regulations and traffic regulations would not take the place of a zoning map. The applicant for a permit to build a shopping center was entitled to his permit although a traffic hazard resulted, a residential development affected, and other problems created.

In *Freeman v. Howie*[26] the court held that two-thirds of the council could control the action of the board when there was a protest, and the municipality could not, by local ordinance, require unanimous action. This same rule would apply to original adoption as well as to changes in the ordinance or map.

B. Reasonableness of Local Ordinances.

The court, 1953, in *Holcomb v. City of Clarksdale*,[27] laid down the tests or principles to be applied by the court when construing a local ordinance. Summarized, these tests or principles are as follows:

1. A zoning ordinance must be construed as a whole; not dissected and considered as a multitude of ordinances having no relation.
2. The classification of property for zoning purposes is a legislative rather than a judicial matter, as are the size, extent and boundaries of zones.
3. The court will not interfere and substitute its judgment for that of the governing authorities unless it is unreasonable, arbitrary, discriminatory, confiscatory or an abuse of discretion.
4. The evidence of abuse must be clear.
5. All presumptions favor the validity of the zoning ordinance.

25238 Miss. 819, 120 So. 2d 165 (1960).

26121 So. 2d 120 (Miss. 1960). *Accord*, City of Hattiesburg v. Mercer, 237 Miss. 423, 115 So. 2d 165 (1959).

27217 Miss. 892, 65 So. 2d 281 (1953) (court quoted from 62 C.J.S. *Mun. Corp.* §§ 226, 228); *accord*, Adams v. Reed, 123 So. 2d 606 (Miss. 1960); City of Hattiesburg v. Mercer, 237 Miss. 423, 115 So. 2d 165 (1959); Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

6. One assailing the validity has the burden of proof to show:
   a. the ordinance is invalid, unreasonable or arbitrary.
   b. there is no permissible interpretation to justify the ordinance.
   c. it will not promote the safety, order, convenience, prosperity, or general welfare of the public.
   d. a public need for the change or amendment sought.
7. Ordinarily a change or amendment involving a single or a few lots will be permitted only where new or additional facts or other considerations materially affecting the merits have intervened since the adoption of the regulations, and the change must be related to the public welfare.

The court has said in many cases that each must be determined and decided under its own peculiar facts and that care must be exercised in applying a decision to see that the facts are substanially identical.[28]

In general the local ordinance must not take private property for public use without compensation.[29] However, in the *Palazzola*[30] case the court held that substantial pecuniary damage may be inflicted without being arbitrary, and in the *Mercer* case,[31] that the zoning ordinance does cause some disadvantage to some individual property owners.

No person may be deprived of property without the due process of law, although reasonable restrictions may be imposed for conservation of health, morals, or public welfare.[32] In the *Jones* case[33] the court held that there must be a substantial relation between the zoning ordinance and the public health, safety, morals and general welfare. The courts have frequently held local zoning ordinances valid generally and held their application under certain factual situations unconstitutional.[34]

The reasonableness of regulations forbidding reconstruction where a specified percentage of a non-conforming building is destroyed was

[28]Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958); Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951); Jones v. City of Hattiesburg, 207 Miss 491, 42 So. 2d 717 (1949); Frederic v. Board of Supervisors, 197 Miss. 293, 20 So. 2d 92 (1944).

[29]Frederic v. Board of Supervisors, 197 Miss. 293, 20 So. 2d 92 (1944).

[30]211 Miss. 737, 52 So. 2d 611 (1951). *Accord*, Hadacheck v. Sebastian, 239 U. S. 394 (1915).

[31]237 Miss. 423, 115 So. 2d 165 (1959).

[32]Frederic v. Board of Supervisors, 197 Miss. 293, 20 So. 2d 92 (1944).

[33]207 Miss. 491, 42 So. 2d 717 (1949). *Accord*, Adams v. Reed, 123 So. 2d 606 (Miss. 1960).

[34]City of Hattiesburg v. Pittman, 233 Miss. 544, 102 So. 2d 352 (1958); City of Gulfport v. Daniels, 231 Miss. 599, 97 So. 2d 218 (1957); Mayor and Alderman of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957); Jones v. City of Hattiesburg, 207 Miss. 491, 42 So. 2d 717 (1949); Frederic v. Board of Supervisors, 197 Miss. 293, 20 So. 2d 92 (1942).

approved in the *Palazzola* case.[35] There, a local ordinance prohibited repairing or rebuilding where more than 50% destruction occurred to a non-conforming building. A hurricane destroyed a combination store and dwelling in a residential zone on the beach. The court held that the denial of a permit for repair and rebuilding was not unreasonable and arbitrary and the court would not interfere. This well written decision should lay to rest any doubt about the non-conforming rule.

The use of variances and exceptions was impliedly approved in the *White* case,[36] but they must be used in keeping with the spirit, intent and purposes of the zoning regulation.[37] The use of set-back lines and side yard lines has been upheld in the *Young* case.[38]

Changes and rezoning are permissible if new or additional facts or other considerations materially affecting the merits have intervened since the adoption of the regulations. The court said in the *Holcomb* case[39] that a change or rezoning should only be used where it involves a single or few lots, and the change must be related to the public welfare. If such is not the case and the neighbors protest, the court will aid the neighbors.[40]

This rule on changes and rezoning casts a strong burden on planners to do the job right in the first instance and a burden on property owners to carefully study the zoning regulations and map, because it might be very difficult to secure changes later in event of protest. Illustrative of this point is the *White* case,[41] where the application for enlarging the non-conforming warehouses, although granted by the city authorities, was not allowed by the court on appeal.

C. Rural Zoning.

In 1944, a local and private act[42] permitted Jackson County to zone 500 feet back from the beach. The board of supervisors in Jackson County adopted an ordinance zoning as a residential area a strip 500 feet wide and about 3000 feet long. This was a barren strip of land containing only one building, apparently unsuited for residential use and not likely to be developed in the near future. Obviously the sole purpose for the ordinance was the imminent construction of a night

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35211 Miss. 737, 52 So. 2d 611 (1951).

36Mayor and Alderman of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957).

37*Ibid.*

38City of Cleveland v. Young, 236 Miss. 632, 111 So. 2d 29 (1959).

39Holcomb v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 281 (1953).

40Mayor and Alderman of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852, (1957); see also, Adams v. Reed, 123 So. 2d 606 (Miss. 1960) (change in zoning approved after protest because in interest of general welfare of municipality).

41*Ibid.*

42Miss. Laws 1944, ch. 198, at 350.

club in the area, and the fear of adverse affect this club would have on its patrons, who were then most employed at Ingalls shipyard building victory ships. *Frederic v. Board of Supervisor of Jackson County*[43] in 1944 tested the validity of the ordinance, and the court took the occasion to lay down its requirements for residential rural zoning.

In the *Frederic* case the court did not pass on the constitutionality of rural zoning because it was not necessary to decide the case, but it was implied that the ordinance would be considered constitutional under certain conditions.

The court said that the reasonableness of any ordinance is a judicial question when applied to a factual situation. The court then set forth what it would consider reasonable and the minimum requirements for a rural zoning ordinance which zoned strictly *residential* property. Following are the minimum conditions set forth:

(1) The area must, in fact, be a residential section manifested by the actual presence of such a number of residences actually inhabited as to disclose that there is a fair or reasonable market demand for that purpose; or absent the above,

(2) The area must have been supplied with utilities, with the conveniences of improved roads, water supply, and ready connection for lighting creating therein a market for residence lots at a fair and reasonable price; or absent both of the above,

(3) There must have been adopted by the public authorities, or by the owners in conjunction with the public, a comprehensive plan to furnish what is mentioned above – utilities and streets – and with dependable assurance that such a plan would be brought to fruition within a reasonably short time, thereby producing a demand for the property for residence purposes at a fair market price.

The court then said that in the future it may revise these standards upward.[44] The court has not laid down criteria for commercial or industrial zoning in rural areas. No other case involving rural zoning has been before the court.

In 1956 act[45] authorizing county zoning does authorize the same type of zoning permitted in municipalities, but provides that the act should

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[43]197 Miss. 293, 20 So. 2d 92 (1944).

[44]Frederic v. Board of Supervisors, 197 Miss. 293, 300, 20 So. 2d 92, 94 (1944). "We repeat that we have outlined conditions which as regards residential zoning or rural property. are to be taken as minimum requirements, for this is sufficient to the present case. As subsequent cases are considered, it may, and perhaps will, be that the court will revise and amend these requirements upward."

[45]MISS. CODE ANN. § 2890.5 (Supp. 1960).

not be exercised so as to require permits for land used for agricultural purposes or farm buildings.

CONCLUSIONS

Mississippi courts have recognized the responsibilities of municipalities to protect property by use of the zoning laws. The courts recognize that the exercise of these laws is a legislative function which the municipalities may exercise with broad discretion. Most cases involving application of zoning laws must be determined solely from the facts in each case. The general principles are well known and accepted by the courts, but the application of these principles to each case depends on the facts in each case. The courts will look to the reasonableness of a local ordinance as applied to any given set of facts, and if there is a way to uphold the local authorities, their decision will be upheld.

There is need to revise our standard zoning law and modernize it in light of techniques developed since 1924. In coming years these revisions will be made. The development of county zoning will be interesting to watch. It will probably only be used in areas which experience residential development outside of municipalities. The court may rewrite the minimum requirements for county zoning as cases appear for decision and establish criteria for commercial and industrial zoning in rural areas.

STATE BAR SECTION

WORKMEN'S COMPENSATION DISCUSSION PANEL*

Hon. John A. Craig, Jackson, Moderator
Hon. Joshua M. Morse, III, Poplarville
Hon. John J. Frazier, Jr., Greenwood
Hon. James S. Eaton, Gulfport
Hon. Curtis E. Coker, Jackson
Hon. William J. Threadgill, Columbus
Hon. William R. Ford, Kosciusko

MR. CRAIG:

The matter relative to the procedure of handling compensation controverted cases will be discussed first. For this discussion I call on Mr. Joshua Morse of Poplarville, who usually represents the claimants in compensation cases.

MR. MORSE:

The first problem that we want to discuss is the one of the lack of an issue forming process in the present administrative procedure used by the Mississippi Workmen's Compensation Commission headed by my good friend, Mr. John Craig.

Some five or six years ago at the Southeastern Regional Meeting of the Compensation Commissioners I raised this same point. The lack of an issue forming process severely hamstrings the claimants because the defendants come in and file no answer in defense and then make every defense under the sun after they have heard all the claimant's proof. What we have finally proposed here, I think, with the agreements of virtually all of the committees, although with some reservations and misgivings on the part of all, is a simplified form of petition and answer. The petition will be in a standard form listing some fifteen or twenty items claimed. Among them, the day of his injury, the place of his injury; the witnesses and what he is claiming; *i.e.*, whether the disability claims are total or partial, temporary or permanent and for how long. Also he must include the average weekly wage he claims he makes, whether he is employed now or not and attach copies of the medical reports and the names of doctors upon whom he will rely. The defendant in

*This discussion panel was presented at the Mississippi State Bar Convention held in Jackson on June 17 and 18, 1960.

turn will be called upon to either admit or deny the printed allegations in this petition. I think he can say "it is denied in paragraph 18," and so on, and it will be sufficient.

Now I think the most promising part of this answer is that the defendant will be required to assert any affirmative defense that he might want to raise or else it will be waived, for example, the statute of limitations, lack of notice, failure to reopen within the prescribed period. Those things will have to be alleged by the defendant in this answer or else they will be waived.

As it is now, the claimant comes in and puts on his lay testimony. Usually he does not have his doctors ready because he never has had to have them ready in the past. The defendant will not put on any lay testimony or any medical testimony. Then you have to have a recessed hearing to take the claimant's medical testimony; then a recessed hearing for the defendant's testimony and another recessed hearing for rebuttal witnesses used. I have had cases that took as long as five, six or seven hearings. We are going to try to arrange it so the case will require one hearing instead of five or six.

If the lawyers will actually try to use this procedure and both sides honestly try to answer and give as much information as they possibly can, this thing will work to expedite hearings.

MR. CRAIG:

Mr. Wiliam Threadgill of Columbus, who frequently represents the defendant in these matters, will discuss the new proposed procedure as it affects the defendant.

MR. THREADGILL:

As to these procedural changes, I think we might first approach it from the standpoint of what the problem is and why the Bar generally ought to be concerned about the situation. We were told at our committee meetings that in some states, for example,Virginia, that the Workmen's Compensation Act is administered in such a way that it is almost perfunctory. There is no hearing at all and the commissioner gets the medical reports and decides what the claimant is entitled to receive. There are very few hearings and the attorney's fee is incidental; ten percent, when they have a hearing rather than twenty-five percent which we have in Mississippi. All of this has been brought about because of the tremendous work load of the commission in Virginia.

The Mississippi commission started off in 1948 or 1949 with, I think, one referee, one full time reporter and one part time reporter. As most of you know, we now have three attorney referees and six full time reporters. Mr. Craig has told me if a case is filed today he could not

possibly hear it until months later. This indicates the work load on the commission and it also indicates the fact that the present procedure is inadequate.

As most of you know, under the present forms the commission requires to be filed, the defendant files B-5 and B-11 forms; the B-5 merely giving the names of the parties, the time and place of the accident, the nature of the accident and the cause of the injury, and the B-11 supposedly sets out the subject of the hearings. Generally you will find that the more experienced claimants' attorneys will say in the B-11 form that they are claiming compensation benefits plus all penalties and damages. As a matter of fact, there has been one case that I know of where the claimant filed his form alleging a back injury and when he got to the hearing it proved to be a heart condition. The reason for the recessed hearings is largely because of the fact that the first meeting of the parties is really comparable to the first round of a boxing match, with each party trying to find out just what the other party's position is without giving away anything himself. In any event, some change must be made and we feel it behooves the Bar Association to take an interest in this matter and try to see that changes are made which will assure that the claim is handled in a judicial manner.

The first purpose of these forms is to narrow the issues, and I understand the commission intends to take the reports filed by the claimant and the report filed by the defendant and have a member of the commission review those forms and to set out the issues. Each party will be furnished a report of what the issues are so that he will know ahead of time what he will be arguing at the hearing. I might say also that these forms represent merely the preliminary draft and certainly suggestions will be welcomed by this committee and by the Bar generally. The commission is going to have to change these forms and change its procedure to some extent in order to handle the work load that it has, and, therefore, the bar committee is taking an interest in any effort to help the commission.

I will set forth the content of these forms. Before doing so I would like to point out that they are going to have to be filed and handled in good faith by both parties because if they are not approached in good faith they will be of little benefit. The first suggested form to be filed by the claimant, which is to supersede the present B-5 and B-11 forms is as follows:

> The claimant alleges that on the ____ day of _____, 19____, the above named claimant was injured in an accident arising out of and in the course of his employment with _____, and for which claim is hereby made for compensation and medical benefits under the Act.
>
> That the following is a statement of facts relative to the

cause: a. Name of claimant, address, occupation and age. b. Name of employer, address, place of business, business address, name of carrier (if known). c. County and place of accident. d. Nature of work this claimant was engaging in at the time of injury. e. Descriptions of the accident and cause of the injury. f. Date employer was first notified of injury, name of person notified and position. g. Name and address of witnesses. h. Was the medical treatment furnished by employer? i. Give description of medical treatment rendered and nature and extent of disability. Give dates of medical care rendered. j. Name of attending and examining physicians and their addresses. k. Date disability began. Date temporary and total disability terminated. l. Date able to resume regular or other employment. m. If unable to resume former or similar employment, is such inability due to permanent disability? n. Average weekly wage at time of injury. o. Did injury result in death? If so, give date of death. p. In the event the injury resulted in death, and if claim is made for death benefits, list the name, address, age, and relationship of each claimant who was dependent and for whom claim is made.

There is a place for name and address and the relationship, and then it concludes by saying that if the matter is not adjusted to effect the voluntary payment of weekly compensation benefits and the supplying of medical care, the matter should be set down as a controverted matter.

You will see already that this form will furnish quite a bit more information than the existing forms require.

We have a tentative draft of the answer that the employer and carried will file to the claims made by the claimant with the commission as follows:

The employer and/or carrier above named for answer to the application herein, respectfully states:

1. It is admitted or denied (strike the one that is inapplicable) that claimant sustained an injury on or about the date set forth in the application.

2. It is admitted or denied that the relationship of the employer and employee existed at the time of the alleged injury.

3. It is admitted or denied that the parties were subject to the Mississippi Workmen's Compensation Act at the time of the alleged injury.

4. It is admitted or denied that at the time of the alleged injury the employee performed services growing out of and in the course of his employment.

5. It is admitted or denied that the accident causing the disability for which compensation is claimed arose out of the alleged employment.

6. It is admitted or denied that notice of injury complained of in the application was received.

7. It is admitted or denied that claimant was temporarily disabled for the period stated in the application. If denied, state temporary disability admitted.

8. It is admitted or denied that claimant is permanently disabled to the extent for the period stated in the application. If denied, state permanent disability admitted.

9. It is admitted or denied that the average weekly wages as set forth in the application are correct. If denied, state average weekly wage admitted.

10. It is admitted or denied that the employer was insured under the Mississippi Workmen's Compensation Act at the time of injury or was a self-insurer under the Mississippi Workmen's Compensation Act.

11. State exactly what matters are in dispute between you and the claimant and your reasons for denying liability as claimed. (If any statements are found to be incorrect an amended answer may be filed.)

Then we have a section on medical reports. It is contended by some that the defendants do not always file all the medical reports that they get in their possession, so it was proposed to add a closing paragraph to this form as follows:

> It is hereby certified that copies of reports of any and all nature pertaining to medical findings, examinations, treatments and/or opinions, from all physicians known to have examined or attended claimant have been, or are being, filed with the Mississippi Workmen's Compensation Commission, at the time this reply is made to claimant's notice and claim for compensation benefits are attached hereto.

I think we will agree that it is not going to be possible, and I do not say it should be possible, to cut out all of the shuffling around that goes on between doctors on both sides. From my standpoint I will say that if the defendant is going to be required to file all medical reports that he has been able to obtain, I cannot say that it would be unfair to ask the claimant to do the same thing. The argument at our meeting was, "Well, the defendants have plenty of money. They can have any doctor they desire," but in my brief experience I have not found that a lack of funds kept the claimant from finding the right one, too. There was another section of this form which was deleted by the committee and we decided to request that the commission handle medical reports by its rules and regulations, the idea being that all medical reports which are obtained between the time that these forms have been filed shall be filed with the commission and made available thirty days prior to the hearing. This is the suggested language:

> It is agreed that any or all future or further medical reports received by the employer or carrier shall be filed with the

> Mississippi Workmen's Compensation Commission at least thirty days prior to the date of the scheduled hearing. It is also agreed that all medical reports filed with the Mississippi Workmen's Compensation Commission shall be considered a part of the official record for any and all purposes of the commission.

Now let me say at this point that I frankly strongly object to any medical reports being construed as evidence. I do not care if you are on the claimant's side or defendant's side, I think if you are in the case you are entitled to cross-examine any doctor who has made a report in the case. As a matter of fact, Mr. Coker, Mr. Eaton and I have convinced ourselves that it is unconstitutional.

The final part of the form was that: "Employer and the carrier herein waive the right to introduce testimony of any doctor whose complete written reports are not filed with the Mississippi Workmen's Compensation Commission." The committee has agreed that it might be going a little too far as it is, but that there certainly should be an exception to expert testimony. In other words, we are trying to set up a procedure so that any doctor who has examined a claimant can be produced, but certainly we should not cut off either party from the standpoint of putting on any medical expert that he wants to and asking hypothetical questions. This would be handled as an exception, and as I say, this matter of medical reports is a matter that should be handled largely by the rules and regulations of the commission. I believe this covers the efforts of the committee in regard to the form. Let me say once again in closing that this is only a tentative first draft and we hope the Bar will take an interest in this matter and will make suggestions to this committee so that we can work with the commission and help them formulate a form that will be fair both to the claimant and to the defendant.

MR. CRAIG:

It is the intention of the commission to ask the proper authorities of the Bar Association to make this a permanent committee of six men who are members of the Bar, three who customarily represent defendants. We believe this will be beneficial to the orderly administration of the Act and we believe it will help the committee materially since through the committee we can get the advice of the various members of the Bar Association better than we could through the efforts of individual commissioners.

The other matter that the panel thought was worthy of discussion was the recent legislative change. Those of you who keep up with Workmen's Compensation and those of you who read the newspaper or keep up with legislation know that perhaps next to the appropriation bills,

the local and private bills, there were more Workmen's Compensation bills in the legislature this time than perhaps any other time. There were approximately thirty-three or thirty-four bills introduced, seven of which passed. Two of them are underwriting or coverage propositions which I do not think are of interest to these groups. The other bills affect the rights of the parties in litigation and in the administration of the Act. At this time Mr. Jimmy Eaton of Gulfport will discuss the recent changes made by the legislature in the Workmen's Compensation Act.

MR. EATON:

At the outset of the Act there was an amendment to Section I wherein the legislature had the following language: "This Act shall be fairly construed according to the law and the evidence." Heretofore our courts have declared a judicial policy of a broad and liberal construction in favor of compensation, predicating that judicial policy on the humane purpose of the Act, saying that it leaves no room for narrow or technical construction. It is my view that this judicial policy must now be re-examined and it must be harmonized with the legislative declaration that the Act shall be fairly construed according to the law and evidence. I do not believe that after this amendment either the commission or the court is justified in putting a more liberal interpretation on the Workmen's Compensation Act than on any other act of the legislature which is brought before it for judicial construction.

Another amendment which will provoke little argument is the amendment to the hernia section wherein the limit of $250.00 on liability for medical payments was removed so that there is no limit now on medical payment in hernia cases.

In the section on definition of disability, the legislature added the following language: ". . .but incapacity and the extent thereof must be supported by medical findings." I think this amendment to the Act is going to have a limiting effect on the findings of disability as have been approved both by the commission and the court in cases which have heretofore been adjudicated. For example, our court recently said in the *Westbrook* case: "It is not necessary that medical testimony be supplied to establish the cause and effect of an injury of the nature which the claimant says he sustained." I think this amendment very definitely will require that medical testimony or medical evidence be adduced to support what is claimed to be the permanent effect of an injury. While it may not be necessary to introduce medical evidence to establish the cause of the injury, I do think that it will be necessary in the light of this amendment that medical evidence be supplied to sustain the burden of permanency of an injury as an effect of the injury.

Another change made in the Act is in the maximum and minimum compensation provisions. Formerly the Act provided that the minimum was $10.00 per week except in partial dependency cases. The legislature amended this to provide a minimum of $10.00 a week except in partial disability cases and in partial dependency cases. We now have an exception to that minimum insofar as partial disability cases are concerned, so that in the case of a partial disability the $10.00 minimum does not necessarily apply now unless the weekly wages would sustain it otherwise.

Perhaps one of the most significant changes that was made in the Act — and this is the last one that I will discuss — is the amendment to the pre-existing disease or condition. The Act before the amendment predicated the effect of a pre-existing condition or situation on reduction of compensation where such pre-existing condition was "aggravated, accelerated or adversely affected by accidental injury, or is in any manner a material, contributing factor in the results following the actual injury." It then went on to provide that this provision, however, operated to reduce compensation which otherwise would apply only where there had been a pre-employment physical examination wherein such disability was disclosed. The amendment appears to authorize the reduction of compensation if the pre-existing condition or contributing factor results following the injury, regardless of whether such pre-existing condition was itself "aggravated, accelerated or adversely affected." It appears that now it is not necessary that a pre-existing condition, relied on to reduce the amount of recovery, first be established by a pre-employment physical examination, nor must it be shown that such pre-existing condition was itself "aggravated or accelerated by the injury" which forms the basis of the claim for compensation. This amendment can very definitely have a material effect on the amounts of compensation awarded in any given case where there is a question of a pre-existing condition.

MR. CRAIG:

Mr. John Frazier of Greenwood, speaking for the claimant, will give his version of the recent legislative changes.

MR. FRAZIER:

From the claimant's view of this we feel that much of the legislation that has come out has done little to change the Act. House Bill 69, which is the portion Mr. Eaton told you about, has been changed to add: ". . .and this act shall be fairly construed according to the law and the evidence." That section reads as follows:

> This act shall be cited, known and filed as the Workmen's Compensation Law and shall be administered by the Work-

> men's Compensation Commission. . . .hereinafter referred to as the Commission, cooperating with other state and federal authorities for the prevention of injury to workers, and in event of injury, their rehabilition or restoration to health and vocational opportunity . . .; and this Act shall be fairly construed according to the law and the evidence.

Regardless of what has been said, you and I as lawyers must admit that this Act is a remedial statute and our supreme court has never held that a remedial statute must be strictly construed, and I do not believe that they will so hold now. The thing that a lot of people have overlooked is that when this bill was submitted in its original form it provided another clause that added: ". . .and shall not be construed liberally in favor of the employee." When this part of the bill hit the floor of the House it was taken apart and the dragon's teeth partially removed by striking this clause. Since this clause was omitted by legislative action, must we not say that the legislature intended the Act should continue to ". . .be construed liberally in favor of the employee." It is certainly our contention that by adding only these words: "and this act shall be fairly construed according to the law and the evidence," that they are saying they are with us, because certainly the claimant is just as willing and just as desirous of having the Act construed fairly according to the law and the evidence as is the employer. Frankly I don't know how it can be construed otherwise. I assume, too, that even prior to the meeting of the legislature that our supreme court was construing it fairly and was construing it according to the law and the evidence. So we on the claimant's side say that by removing that part of the bill that said "it shall not be construed liberally in favor of the employee" that the tooth of the dragon was removed and that actually there is no change in the import or intent of the statute.

Getting to the hernia case, we all agree that this provision is helpful insofar as the claimant is concerned and there is no disagreement on the hernia bill.

On the statute on disability, the definition of the term "disability" was changed to add: "which incapacity and the extent thereof must be supported by medical findings." Heretofore the term "disability" had read: "Disability means incapacity because of injury to earn the wages which employee was receiving at the time of injury in the same or other employment." The only change was by adding the phrase, "which incapacity and the extent thereof must be supported by medical findings." The act does not say, "must be measured by medical findings." It does not say, "it must be determined by medical findings." It says, "must be supported by medical findings." Frankly, in my practice before the commission, I have never had a case where the claim of the employee was not supported by medical findings. I believe there is one case decided

by the supreme court where the doctors could not determine the particular cause but they did say the claimant was disabled, and even under that case I beleive we could say that it was supported by medical findings because in that particular case the doctors admitted that there was medical disability. The argument presented by Mr. Eaton is to the effect that the medical examination now must determine the effect of the injury. I think that counsel is in error at this particular point in that under the Act most of our controverted cases arise in the non-scheduled injury. Most of the cases that arise where there is a scheduled injury and a doctor comes in and testifies as to the hand or foot or leg are fairly certain. Here there is very little controversy. Most controversy results from the heart, back and head cases. In these cases we must remember that proof of disability under this Act still does not provide the measure of recovery of the claimant. This is set out in a portion of the Act that was not changed under section 8621 to provide the rate of recovery as follows: "In all other cases in this class of disability." In other words, this makes it mandatory that disability must be proved. The compenation shall be 66 2/3 percent of the difference between the average weekly wages subject to the maximum limitations as to weekly benefits as set up in this Act and his wage earning capacity thereafter in the same employment or otherwise. This was not changed, so now after the claimant proves his disability and has a doctor support this testimony, the extent of his disability under this portion of the Act is measured by his decrease of wage earning capacity, and I say that no doctor is competent to testify as to a man's wage earning capacity. He can only testify in the medical field. He does not know what the man has done. He does not know what he is capable of doing. If I had an injury to my back as a lawyer, certainly it is not going to incapacitate me as much as it will a laborer who has a first grade education and who has done bending and stooping all of his life. This type thing cannot be measured by medical testimony. It has to be measured in the individual case as to how it affects that particular employee. So we get back to the fact that this portion amended by the legislature determined only what must be put into evidence to affect the employee's rate of recovery and it does not affect his rate of recovery. At least we must take it to be so in the non-scheduled injury cases and in temporary, partial disability cases where the Act provides that the rate of payment shall be the difference between his wages earned at the time of the accident and his wage earning capacity thereafter in the same employment, or otherwise.

In House Bill No. 68, of course, the legislature has deleted the $10.00 minimum on partial disability cases where the Act provides that the rate of payment shall be the difference in his wages earned at the time of the accident and his wage earning capacity thereafter in the same

employment or otherwise. This was done in order that in those cases where a man is finally determined to have the one percent disability he will not have to pay $10.00 a week under the minimum portion of the statute.

Another portion of the Act mentions that a total recovery exclusive of medical payments under section 7 thereof, arising from an injury to an employee or death of employee, or any combination of such injury, or death, shall not exceed $14,500.00. Many people thought this provision would limit the recovery so that one would not be able to get a lot more money out of the insurance companies, and therefore, that there would be a lower rate of premiums. Actually this has not been the result. I made a hasty examination at the commission and from what I understand from the chairman, there have been over 6,500 cases presented to the commission since they have been in operation. Of that 6,500 they have had two cases where more than $14,500.00 has been paid. So, frankly, I do not see how that is going to effect any sharp decrease in any premium rate in compensation in Mississippi.

The last bill, which is probably the most controversial of the bills, House Bill No. 67, provides for certain pre-existing handicaps of these cases, and since Mr. Morse has briefed this portion I would like to have him present that to you. I would like to say at this time that if you notice, they say that the amount of compensation which would be payable shall be reduced by that proportion which such pre-existing physical handicaps contribute to the reduction of the results of the injury. I do not believe that the supreme court is going as far as some think that they will go on that particular Act. For instance, you remember the phrase, "the one armed paper hanger." Suppose we did have a one armed paper hanger and he was injured while on the job. He fell off the ladder and the employer said, "Well, if he had had two arms he could have caught something up there and held on, so therefore he is not entitled to compensation." I do not believe the supreme court is going so far on this particular portion of the Act so as to exclude the employee from recovering compensation. One must determine these things in the light of common sense and limit this application. Frankly I am very doubtful that after the Act is fairly construed "according to the law and the evidence" that we are going to find that it has made as material a change in the outcome of compensation cases as some counsel would have you believe.

MR. MORSE:

House Bill 67 was certainly intended to be the most vicious of these amendments. That bill has been said to limit compensation in those cases of aggravation. Mr. Eaton said cases of aggravation of pre-existing

disease and/or lesions, but if you will read the Act as passed by the legislature, you will not find one sentence, one phrase or one paragraph in it that mentions "aggravation, acceleration" or anything else that would affect any heart case that our court has passed upon. The Act says that: "where a pre-existing handicap, disease or lesion is a material, contributing factor in the result following injury," and so on, "it shall be reduced by the proportion which said pre-existing physical handicap or lesion contributed to the production of the results following an injury." In other words, it must be a proximate cause. I say that with decided cases of the Mississippi Supreme Court before me, that based on almost identical language in health and accident policies, the standard health and accident policy provides for payment for bodily injury resulting directly and exclusively of all other causes sustained by violent and external means, and now they provide further for a reduction in benefits for any loss which results from or is contributed to by sickness or bodily or mental infirmity.

There are ten or fifteen Mississippi cases construing those provisions, and in every one of them the court, where it was shown that there was an accident or injury which precipitated, which aggravated, or which accelerated a pre-existing disease – and that includes arteriosclerosis, epilepsy and almost every disease that they are screaming about – has held that the full amount of the policy should be awarded

The court has said, and I quote from *Hood*, the first case in Mississippi:

> It is not sufficient to defeat the policy that the accident may have made some latent disease active and of such character and virulence as to endanger life apart from the accident, but might not have done so had the accident not happened, then that might be said to be a proximate contributing cause. . . . We are of the opinion that it was a question for the jury under all the facts and circumstances to determine. . .whether death resulted directly and independently of all other causes.

FEDERAL TORT CLAIMS ACT*

General Conditions.

Congress adopted the Federal Tort Claims Act in June 1948. That Act constitutes a fundamental departure from the rule of governmental immunity from suit on claims of negligence. It has provided a remedy for the recovery of damages in a multitude of situations; and the importance of the relief allowed by the Act is destined to grow because of the ever widening range of diverse activities emanating from establishing policies of the United States Government. It must be borne in mind that Congress, having consented for the Government to be sued for negligence, has attached certain conditions to that right of suit. Unless these conditions are strictly complied with by the plaintiff, his action will fail.

It may be stated broadly that the principal conditions imposed by the Federal Tort Claims Act upon the right to sue are as follows:

1. Suit must be brought in the United States District Court, and not elsewhere.

2. Trials are before the court without a jury.

3. The federal venue statute applies exclusively; that is to say, a suit can be brought only in the judicial district where the plaintiff resides or where the act or omission complained of occurred.

4. The action must be brought within the time specified: namely, two years after the claim arose unless it involves not more than $2,500.00 and is presented to a federal agency for administrative adjustment, in which event suit must be brought within six months after date of final disposition by the administrative agency.

5. Attorney fees are limited. A maximum 20% of the amount recovered is allowed if suit is brought, or not more than 10% of the amount of settlement on the administrative level.

6. A judgment in a suit against the United States is a bar to suit against the negligent employee.

7. The Act prescribes and regulates the manner of making compromise settlements.

8. Interest prior to judgment is not allowed on a claim; likewise, punitive damages are not allowable.

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*Presented as a part of the Discussion Panel on Negligence Actions at the Mississippi State Bar Convention by Mr. William C. Keady, Attorney at Law, Greenville, Mississippi, on June 18, 1960. The Moderator of the Panel was Mr. Justice Robert G. Gillespie of the Mississippi Supreme Court. The other attorneys on the Panel were Messrs William A. Strong, Jr., Louisville; Lester F. Williamson, Meridian; Pat H. Eager, Jackson; Robert W. Thompson, Jr., Gulfport; and M. M. Roberts, Hattiesburg.

9. No suit may be brought against the United States while a claim is still pending before a federal agency.

10. A number of exceptions are provided for which no action may be brought.

The usual situations involved in suits brought under the Federal Tort Claims Act deal with automobile accidents with vehicles driven by federal employees, injuries received while frequenting public buildings or premises, airplane operations by government pilots, damages to property resulting from negligence in the construction of government projects, or injuries received for military activities.

Liability of the United States.

Under the Federal Tort Claims Act civil actions for money damages for injury or loss of property, or personal injury or death, may be maintained against the United States, provided:

1. The wrongdoer at the time of the act was an employee of the United States not exempted from the operation of the Act,

2. The wrongful act occurred while such employee was acting within the scope of his office or employment, and

3. The damages in question were caused by the negligent or wrongful act of such employee, and

4. The act or omission occurred under circumstances where a private person would be liable to the claimant in accordance with the law of the place where the act or omission happened.

All four elements must be present for successful suit to be maintained against the United States.

1. *Federal Employee.* The act must have been committed by an "employee of the government," or a federal employee. That term expressly includes officers or employees of any federal agency as well as persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and it includes members of the military or naval forces of the United States. It does not include a federal judge, a trustee in bankruptcy, a member of the Congress, or other persons who are not in the employment sense subject to the control of the government. The Act expressly excepts certain classes of governmental activity so that any employee working in those excepted fields would not be an "employee of the government" for which suits would be maintainable. The term "federal agency" is defined as including the executive departments and independent establishments of the United States and also corporations primarily acting as instrumentalities of the United States.

Most of the litigation concerns the acts of military personnel. Army officers assigned to the Reserve Officer's Training Corps are federal employees but not members of a national guard unit unless it had been

ordered into active federal service.

The following have been held to be federal agencies: The Inland Waterways Corporation, an air force post exchange and a civilian swimming pool at an air force base operated by government agents. Held not to be federal agencies are a municipal department of the Virgin Islands, the Civil Air Patrol, and a railroad seized by the federal government to prevent a strike.

2. *Within the Scope of Employment.* The wrongful act must be performed by an employee while acting "within the scope of his office or employment." With respect to a member of the armed forces, this is statutorily defined as "acting in the line of duty." "Acting within the scope of employment" means that the particular employee must be then performing the task which he was employed to do and not some other task which was the proper concern of another employee. It is not enough that the government might be deriving a benefit from the work being performed by the employee, nor can estoppel, waiver or consent dispense with the necessity of showing that the tortious act was within the scope of employment. That question is clearly a federal—and not a state—question, which is to be decided by resort to the applicable federal statute, regulation or rule relating to the work activity of the individual employee. It has long been the rule that the United States can be bound only by agents acting within the scope of the authority delegated to them, and all persons dealing with federal employees are chargeable with notice of precise area of authority, with accompanying limitations, as to the particular employee involved.

The burden is on the plaintiff to establish affirmatively that the tort-feasor was acting within the scope of his employment. Mere proof of ownership of a government truck involved in an accident and that a soldier was driving it, does not constitute a presumption that the soldier was acting within the line of duty at the time. It is not sufficient to show circumstances which might be sufficient, in the absence of proof to the contrary, to infer that the tort-feasor's act was authorized. If all of the evidence fails to establish clearly that the act was one done within the scope of office or employment, the plaintiff's suit will fail.

3. *The Claim Must Be in Tort.* The damages for which recovery is sought must have resulted from an act of a federal employee which is negligent or wrongful. Whether the act performed was governmental or non-governmental is immaterial. The United States is not liable for the actions of its employees which do not constitute torts so the plaintiff must prove negligent or intentional wrongdoing on the part of an employee of the government which caused his damage. It will not suffice to contend liability should rest upon equitable, contractual or quasi-contractual grounds; the claim must be one provable in negligence.

A clear-cut statement outlining the scope of tortious liability was made by the Fifth Circuit Court of Appeals in *United States v. Campbell,* 172 F.2d 500, as follows: "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states."

4. *Liability in Accordance with Law of Place Where Act Occurred.* No liability attaches to the United States on a claim for tort unless the negligent or wrongful act or omission of the employee of the government occurred "under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred." Thus, the standard of care, or want of care, is to be judged as if the United States were a private person without governmental immunity and, of course, without regard to whether the particular activity involved was governmental or proprietary. The substantive law of the state or place where the tort was committed is applicable and furnishes the exclusive standard for the rule of negligence that is to govern the particular case. Of course, the Federal Rules of Civil Procedure regulate the proceedings in the district courts involving suits under the Tort Claims Act, but the United States will be held to the same duty of care as state law will impose upon private persons and this is applicable to those classified as invitees, licensees, guests or passengers in government automobiles, and covers the entire range of negligence such as the duty to maintain buildings and premises in a reasonably safe condition. In a proper case the doctrine of *res ispa loquitur* is applicable. Of course, the government as defendant in a tort claim suit has the same defenses as private defendants in accordance with the laws of the state such as plaintiff's failure to prove negligence or proximate cause, assumption of risk, contributory negligence, release or other matter involved in the claim. In essence, all matters of substance relating to the claim for negligence and all defenses thereto are altogether regulated and controlled by the law of the state where the accident occurred. Thus, for all practical purposes, the law applicable in a Tort Claims suit is precisely the same as that which would control in a diversity of citizenship case in Federal Court.

Exceptions to the Act.

There are thirteen exceptions which expressly do not come within the terms of the Federal Tort Claims Act and the careful practitioner will at the outset determine whether his case falls within any one of

those categories. Chief among these exceptions are the following claims:

1. Any claim arising in a foreign country.

2. Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.

3. Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

4. Any claim based upon the act or omission of an employee exercising due care in the execution of a statute or regulation, regardless of whether such statute or regulation is valid.

5. Any claim based upon the exercise or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

This last category of excepted liability deserves special comment. It has been said by the Fifth Circuit Court in *Fair v. United States,* 234 F.2d 288, that "If the government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care," and "The government is liable for the actions of its employees dealing directly with the public in the application of established policies even if such employees are vested with a measure of discretion." The United States Supreme Court has said that a discretionary function which is beyond the scope of the Act includes more than the initiation of programs and activities and that it also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation, and the acts of subordinates in carrying out the operations of government in accordance with official directions. *Dalehite v. United States,* 346 U. S. 15. Many courts have, however, clearly adhered to the view that the government may be liable for the negligent acts or omissions of its employees on the "operational level" arising out of the course of an activity the institution and policy of which are matters for governmental discretion. See *Bullock v. United States,* 145 F. Supp. 824.

Procedure for Suit.

The procedure in a tort action against the United States is controlled by the Federal Rules of Civil Procedure which means that the complaint should contain a short and concise statement of the claim showing the plaintiff is entitled to relief under the Federal Tort Claims Act and a demand for damages. It should allege the time and place of the act or omission complained of, the fact that the tort-feasor was an employee of the government at such time and place acting within the scope of his office or employment, that he was negligent and that such

negligence caused the plaintiff's injuries or damages which should be briefly set forth together with a demand for money damages. As prescribed by the federal rules, the complaint should be signed by an attorney of record but need not be verified. The action is commenced upon the filing of the complaint but two copies of the complaint are to be filed along with the original. The clerk of the court prepares the summons which is served by the United States Marshal. This is done by delivering a copy of the summons and of the complaint to the United States Attorney for the district within which the action is brought and also by sending a copy of the summons and complaint by registered mail to the Attorney General at Washington.

The suit can be brought only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

Individuals may be sued as co-defendants along with the government in case joint or concurring negligence is charged. In such case, individual co-defendants may obtain a jury trial but the issues as to the United States can only be tried to the court without a jury.

The United States may counterclaim or assert any set-off, claim, or demand which it may have against the plaintiff.

After suit has been filed, all negotiations for compromise settlement are carried on by the United States Attorney's office, but no settlement can be made without approval by the United States District Judge before whom the action is pending. If the claimant and the United States Attorney's office come to an agreement, the responsibility for passing on the settlement is vested in the court which satisfies itself that the settlement is reasonable and proper and for that purpose may take proof to satisfy itself on all basic issues of jurisdiction, liability, injuries and damages.

As a general rule, the damages allowable in a tort claims suit are to be calculated in the same manner as if the suit were against a private person, as they may be determined by the law of the state in which the accident occurred, subject to three notable exceptions: (a) No interest prior to judgment is permissible. (b) Punitive damages are not recoverable. (c) In death cases where the law of the state provides for damages only punitive in nature, the United States shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the person or persons for whose benefit the action was brought, and such actual damages shall be in lieu of punitive damages in a death case as may be allowed by state law.

State laws which place maximum limitations upon the amount of recovery in wrongful death actions apply to suits against the United States under the Federal Tort Claims Act unless the state law allows only punitive damages, in which event the federal rule of actual or

compensatory damages resulting in financial loss to the plaintiff comes into play.

The amount of damages is, of course, determined by the district judge whose decision is, on appeal, subject to review on that issue, as well as on liability, by the United States Court of Appeals.

Procedure for Administrative Adjustment.

A practical aspect of the Tort Claims Act is that in cases involving not more than $2,500.00 claims, rather than court actions, may be filed in the first instance with the appropriate federal agency. If an administrative adjustment is sought, it must be for an amount not greater than $2,500.00 and no suit can be filed thereon as long as the claim is pending before the agency. If the agency has not acted on the claim, notice of withdrawal of the claim must be given to the agency before suit is brought in court. You are to be cautioned that suit in case of withdrawal must be brought within six months after such withdrawal or after the agency has finally acted upon the claim. A further word of caution must be given as to the amount for which claim is made in an administrative adjustment, for no action can thereafter be brought for any greater sum in excess of the amount of the claim presented to the federal agency except upon the basis of newly discovered evidence or proof of intervening facts. All claims must, of course, be presented to the federal agency within two years after the claim has accrued or else it is barred by the Federal Statute of Limitations. If an administrative adjustment is made, the federal act expressly provides that the attorney fee allowable to the claimant shall not exceed 10% of the settlement made under any federal agency provided the recovery is $500.00 or more. An attorney who collects more than the maximum fees allowed by the federal statute is subject to a $2,000.00 fine and one year imprisonment.

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STUDENT COMMENTS

MISSISSIPPI WORKMEN'S COMPENSATION AMENDMENT ON APPORTIONMENT FOR PRE-EXISTING CONDITION

In the spring of 1960 seven amendments were made to the Mississippi Workmen's Compensation Act, most of which were directed toward reducing the benefits and restricting the application of the Act.[1] One of these amendments concerns the pre-existing physical condition of an employee who subsequently suffers an industrial injury:

> Where a pre-existing physical handicap, disease or lesion is shown by medical findings to be a material contributing factor in the results following injury, the compensation which, but for this paragraph, would be payable shall be reduced by that proportion which such pre-existing physical handicap, disease or lesion contributed to the production of the results following the injury.[2]

In 1958 the Mississippi legislature first dealt with this problem of apportionment by passage of an amendment which read substantially as above, but with the added requirement that the pre-existing condition be disclosed by a pre-employment physical examination.[3] Prior to that time the employer was liable in full to an employee for resulting disability where a pre-existing disease, handicap or lesion was aggravated, accelerated or adversely affected by accidental injury arising out of and in the course of employment.[4] The purpose of such legislation which relieves the individual employer of liability for pre-existing infirmities is two-fold: (1) it tends to lessen discrimination in hiring handicapped workers, and (2) it eliminates an injustice to the employer who would, without the apportionment rule, be required to pay more compensation for injury to a handicapped worker because of the pre-existing infirmity or injury.[5]

It should be noted that the apportionment and non-apportionment rules are affected by the presence of second injury funds.[6] Such funds provide compensation in situations where an employee, having previously suffered some disability, subsequently suffers an industrial injury which results in his being more disabled than he would have been had there been no prior disability.[7] A common example is that of a man

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[1] DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 246 (Supp. 1960).

[2] MISS. CODE ANN. § 6998-04 (Supp. 1960).

[3] MISS. LAWS, ch. 454 (1958).

[4] Shanahan, *Amendments to the Workmen's Compensation Act*, 30 MISS. L.J. 105, 108-09 (1959).

[5] *Id.* at 109.

[6] See 2 LARSON, WORKMEN'S COMPENSATION LAW § 59.20 (1952).

[7] See generally *id.* at §§ 59.30-34.

who has previously lost one eye and who loses the other eye in the course of employment. The employee is totally disabled, but the employer pays compensation for the second injury considered alone and the second injury fund pays any additional compensation due as a result of the entire disability. Money for the fund is ordinarily collected by the state levying on the employer or his insurance carrier a tax equal to a small percent (usually 1%) of the amount of total compensation paid by the employer annually[8] *or* by having the employer or carrier pay into the fund a specified sum whenever an employee is fatally injured in the course of his employment.[9] The money is usually paid into a separate account of the state treasury and disbursements are made by a second injury fund commission or, as in Mississippi, by the Workmen's Compensation Commission itself. It is evident that such funds are helpful in furthering the humanitarian purpose of Workmen's Compensation while at the same time reducing the individual liability of an employer who hires handicapped or injured workers.

The purpose of this comment is to compare the 1960 Mississippi amendment on apportionment with similar legislation in other states. In so doing it will be necessary to compare the Mississippi second injury fund with that of other states and to study the effect of such funds on apportionment statutes.

I. PRE-EXISTING DISEASE

In absence of statute, the general rule is that the employer takes the employee as he finds him, and pre-existing disease does not bar or reduce recovery.[10] The rule is usually stated that pre-existing disease is compensable if the employment injury aggravates, accelerates, or combines with disease to produce death or disability.[11] Because this rule sometimes leads to inequities, some states have enacted laws changing or modifying the rule.

One state with such statutory modification of the rule is California. The statute there provides for employer liability only for the proportion of disability due to the aggravation of the prior disease which is reasonably attributable to the injury.[12] In construing this section the court laid down the rule that a resultant disability which is due entirely to the "lighting up" or aggravation of a pre-existing disease by industrial injury renders the employer liable in full. If, however, the disability is due in part to the normal progress of a pre-existing disease

[8] *E.g.*, OKLA. STAT. ANN. tit. 85, § 173 (1951).

[9] *E.g.*, MISS. CODE ANN. § 6998-37 (1956).

[10] 1 LARSON, *op. cit. supra* note 6, at § 12.20.

[11] *E.g.*, Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645 (1952) (prior to the amendment).

[12] CAL. LAB. CODE § 4663.

and in part to the industrial injury, then the commission must apportion the percent due to the pre-existing condition and compensation will not be allowed for that proportion.[13] It should be noted that another section of the California Act provides for compensation from the second injury fund for the prior disability when connected with a subsequent industrial accident to produce 70% or more of total disability.[14] It is further provided in the same section that the subsequent injury must contribute at least 35% or more of the total disability in order for the employee to receive compensation from the second injury fund. Subject to the above restrictions as to percent of disability, the second injury fund is liable for prior permanent disability. It has been held that a prior diseased condition of the body is a "prior permanent disability" if such condition in fact constitutes an industrial disability.[15] This rule of apportionment is not applicable to death cases.[16] In summary, California provides compensation by the employer for aggravation of a pre-existing disease when reasonably attributable to the injury.

Other states with similar apportionment statutes are Florida,[17] North Dakota,[18] Connecticut,[19] and Maryland.[20] The Connecticut statute has been rather belatedly held to apply to occupational disease only.[21] Despite variations in interpretation of these statutes, they all have one thing in common – compensation is allowed for aggravation of pre-existing disease by industrial injury.

A different wording of the apportionment statute is found in the Washington Act. If it is determined that a pre-existing disease delays or prevents complete recovery from an industrial accident, compensation is allowed only for the period in which the injury would have been disabling had there been no pre-existing disease.[22] This section has been interpreted as providing for reduction of compensation where the pre-existing disease affects the injury adversely, but allowing full compensation where the injury adversely affects the disease.[23] Thus an injury

[13]City of Glendale v. Industrial Acc. Comm., 153 Cal. App. 2d 213, 314 P.2d 182 (Dist. Ct. App. 1957); Bowler v. Industrial Acc. Comm., 135 Cal. App. 2d 562, 287 P.2d 562 (Dist. Ct. App. 1955).

[14]CAL. LAB. CODE § 4751.

[15]Acme Pattern & Foundry Co. v. Industrial Acc. Comm., 17 Cal. Comp. Cases 108 (1952).

[16]State Subsequent Injuries Fund v. Industrial Acc. Comm., 135 Cal. App. 2d 544, 288 P.2d 31 (Dist. Ct. App. 1955).

[17]FLA. STAT. ANN. § 440.02(19) (1952).

[18]N. D. REV. CODE § 65-0515 (Supp. 1957).

[19]CONN. GEN. STAT. REV. § 31-139 (1958).

[20]MD. ANN. CODE art. 101, § 36(7) (1957).

[21]Cashman v. McTerman School, 130 Conn. 401, 34 A.2d 874 (1943).

[22]WASH. REV. CODE § 51.32.100 (1959).

[23]McArthur v. Department of Labor & Industry, 168 Wash. 405, 12 P.2d 418 (1932).

which aggravated a pre-existing disease would be compensable.

The Idaho statute is similar to the Washington statute, but it does not apply to cases in which the injury is conclusively deemed to be total and permanent, such as loss of both arms or both legs,[24] nor does it apply to an injury causing death.[25] Compensation has been allowed for aggravation or lighting up of a pre-existing disease by industrial accident.[26]

The Kentucky statute is illustrative of the difficulty inherent in apportioning disability due to pre-existing disease. As originally enacted, the Act provided that the definition of the word "injury" did not include pre-existing disease.[27] This was interpreted by the courts as meaning that the disease must have manifested its active *disabling* effects to some extent prior to the time of the industrial accident.[28] This decision caused the Act to be amended with the following provision: "whether previously disabling or not . . ."[29] In effect the rule allowed no compensation to an injured employee for any part of the disability which was attributable to a pre-existing disease. The stringency of this rule proved unsatisfactory and the Act was again amended in 1960 to provide that the employer would continue to be free from liability for any disability due to a pre-existing disease, *but* that the second injury fund would pay for any additional disability "resulting from a dormant disease aroused into disabling reality by the injury or occupational disease."[30] Compensation for pre-existing disease which was disabling prior to the industrial injury is specifically denied under the Act.[31] In essence an employer is not liable for any disability due to pre-existing disease, but the disabled employee can collect from the second injury fund for any dormant condition aroused into disabling reality by industrial accident. It is required that there be a "traumatic injury by accident."[32] Thus it would appear that the act provides sufficient counter-balance to prevent it from being turned into a general health insurance policy.

It is readily seen that the Acts in the three representative states of California, Washington, and Kentucky all provide ultimately for adequate compensation where a previously dormant disease is rendered disabling by an industrial accident. As it was once colorfully put, an employee should be compensated for a disease which had lain in harmless

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[24]IDAHO CODE ANN. § 72-323 (1949).

[25]Bishop v. Morrison-Knudsen, 64 Idaho 806, 137 P.2d 963 (1943).

[26]See, *e.g.*, Zipse v. Schmidt Bros., 66 Idaho 30, 154 P.2d 171 (1944).

[27]KY. REV. STAT. § 342.005 (1) (1946).

[28]Wood-Mosiac Co. v. Shumate, 305 Ky. 368, 204 S.W.2d 331 (1947).

[29]KY. REV. STAT. § 342.005 (1) (1960).

[30]KY. REV. STAT. § 342.120 (4) (1960).

[31]*Ibid.*

[32]KY. REV. STAT. § 342.005 (1) (1960).

and inert condition, like a sleeping dog until along came the vicious kick of a work-connected injury and aroused it into disability.[33] The breadth of the 1960 Mississippi amendment seems to make no allowance for such a situation.

II. PRE-EXISTING PHYSICAL HANDICAP OR LESION AND SECOND INJURY FUNDS

In absolving the employer of full liability, the Mississippi amendment refers to "pre-existing physical handicap" or "lesion."[34] Lesion is defined as: "any pathological or traumatic discontinuity of tissue or loss of function of a part."[35] For convenience these will be referred to as infirmities.[36] It would appear that the wording of the amendment is broad enough to cover any pre-existing infirmity which might arise as long as it is a material contributing factor in the results following the injury.[37] There is no requirement, as in some states,[38] that the pre-existing infirmity have been labor disabling, nor does it appear that prior knowledge on the part of the employer is required.[39] Application of the amendment will no doubt create serious problems of administration and of determination of facts,[40] but such problems are beyond the scope of this paper. One important aspect of these problems can be examined and compared with solutions found in other states, and that is the adequacy of the second injury fund in light of the new amendment.

The Mississippi second injury fund extends benefits to employees who have lost, or lost the use of, one hand, one arm, one foot, one leg or one eye, and who subsequently become *permanently* and *totally* disabled through loss of another member or organ.[41] It has been shown that one state[42] provides in such situations for compensation from the fund whenever the combined permanent disability is 70% or more of the total, provided at least 35% of the disability is due to the subsequent injury. Another state, Ohio, has set up a fund specifically for handicapped persons, broadly defined as any employee afflicted with any mental or physical impairment of such character as to constitute a handicap in obtaining employment.[43] The fund pays the injured employee not only for disability which is increased due to the impairment,

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33Wood-Mosiac Co. v. Shumate, 305 Ky. 368, 204 S.W. 2d 331 (1947).

34MISS. CODE ANN. § 6998-04 (Supp. 1960).

35DORLAND, AMERICAN ILLUSTRATED MEDICAL DICTIONARY 814 (22d ed. 1951).

36DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 94.4 (Supp. 1960).

37DUNN, *op. cit. supra* note 1, at §§ 94.4-5.

38*E.g.*, Ingalls Shipbuilding Corp. v. Cahela, 251 Ala. 163, 36 So. 2d 513 (1948).

39DUNN, *op. cit. supra* note 1, at §§ 94.4-5.

40*Id.* at § 94.7

41MISS. CODE ANN. § 6998-37 (1956).

42CAL. LAB. CODE § 4751.

43OHIO REV. CODE § 4123.343 (Anderson Supp. 1955).

but also for disability from injury which would not have happened but for the impairment.

The New Jersey Act[44] and the Washington Act[45] both provide a second injury fund for anyone who has a prior permanent injury and then is subsequently, permanently and totally disabled. The North Dakota Act holds the employer liable for the subsequent injury or for aggravation of a previous injury, but the second injury fund pays the rest.[46] No specific prior injury is required. Kentucky has evolved the novel approach of having the second injury fund the remaining compensation due an employee whenever the same employer continues to employ or re-employs a worker injured in his employment provided the worker is paid wages equal to or greater than those prior to the injury.[47] In comparison, the Mississippi second injury fund covers only the five specified members and the resulting disability must be total and permanent.[48]

This by no means exhausts the study of second injury funds, for there are now such funds in all but four states.[49] However, it is a sampling sufficient to illustratate the comparsion of the coverage of other states with that of Mississippi.

CONCLUSION

The Mississippi amendment is very broad and comprehensive in its prohibition against the payment of compensation for disability due to *any* pre-existing condition. In at least one aspect of pre-existing disease, that of dormant disease aroused into disability by industrial injury, the amendment is more sweeping in its apportionment than any other act. Although this may be quite beneficial to the employer, it may very well work injustice and hardship on the employee. The solution seems to lie in the second injury fund, for this allows compensation to the employee without taking it directly from the employer. Payment from the second injury fund does not increase the employer's accident rating.

When an employee with a pre-existing physical handicap or lesion is injured, even though permanently and totally, he is not entitled to compensation from the Mississippi second injury fund *unless* the prior injury was to one of the five specified members. It is submitted that the coverage of the second injury fund, in light of the recent amendment, is much too narrow. It would be foolish to urge that one form of second injury fund be utilized rather than the others, but the great number and variety of such funds now operative in other states offer Mississippi

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44N. J. STAT. ANN. § 34-15-95 (Supp. 1960).

45WASH. REV. CODE § 51.16.120 (1959).

46N. D. REV. CODE § 65-0418 (Supp. 1957).

47KY. REV. STAT. § 342.120(5) (1960).

48MISS. CODE ANN. § 6998-37 (1956).

492 LARSON, *op. cit. supra* note 5, at § 59.31

the opportunity to select one that better fits our needs.

Construction of the amendment will involve complex problems. Two other amendments made during the same session of the legislature must be considered. One provides that the "act shall be fairly construed according to the law and the evidence."[50] Another provides that the extent of incapacity because of injury due to work "must be supported by medical findings."[51] As an example of the interaction of these amendments, the apportionment amendment provides for reduction of the "compensation." The definition of "compensation" in the Act is "the money allowance payable to an injured worker or his dependent. . ."[52] *Query*: Does a "fair" construction of the Act exclude medical payments from the definition of compensation, thereby denying the apportionment of said medical expenses, despite a decision prior to the amendments which held medical expenses to be compensation?[53]

Hollaman M. Raney

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[50]MISS. CODE ANN. § 6998-01 (Supp. 1960).

[51]MISS. CODE ANN. § 6998-02 (9) (Supp. 1960).

[52]MISS. CODE ANN. § 6998-02 (10) (Supp. 1960).

[53]Shainberg's Black & White Store v. Prothro, 238 Miss. 444, 118 So. 2d 862 (1960).

TAXATION OF PROFITS REALIZED FROM THE TRANSFER OF A RIGHT UNDER THE COPYRIGHT ACT*

The Constitution of the United States confers upon Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] This clause is the basis of the national Copyright Act[2] which extends to the owner of a copyright certain exclusive rights.[3] The purpose of this article is to examine the taxation of profits realized from the transfer of only one of these rights. As yet the courts are not in agreement as to whether such income should be given capital gains treatment, or should be taxed as ordinary income.

A determination of this matter is important to the copyright holder. If the transfer constitutes a "sale or exchange of a capital asset" then the money received therefrom will be taxed as a capital gain. If, on the other hand, the transfer is a license and not a sale, the consideration for the license will be taxed at ordinary income rates. Capital gains receive a more favorable tax treatment than is accorded ordinary income. For example, if the net long-term capital gains of a corporation exceed the net short-term capital losses, then the corporation may choose to pay an optional tax consisting of the sum of "(1) a partial tax computed on the taxable income reduced by the amount of such excess . . . and (2) an amount equal to twenty-five percent of such excess. . . ."[4] A taxpayer other than a corporation may choose the aforesaid optional tax available to a corporation, or he may be taxed to the extent of his gross income less fifty percent of such excess.[5] Consequently, the taxpayer has a considerable amount to gain by classifying his income as money received from the "sale of a capital asset."

The question then arises as to whether a grant of a right under the copyright is a sale of a capital asset. Obviously there are two standards to be met: (1) the right must be a "capital asset" and (2) the transfer must be a "sale." The nature of the transfer, i.e., sale or license of such a right, is a much litigated matter and will be examined at length. The rights embodied in a copyright are clearly within the general

*This article is an entry in the Nathan Burkan Competition.

[1]U. S. Const. art. I, § 8.

[2]17 U. S. C. § 1 (1909).

[3]They include the right (a) to print, publish and sell copies; (b) to translate, to dramatize, to convert into a novel; (c) to deliver, authorize the delivery of, read, or present the copyrighted work in public for profit; (d) to perform publicly, to make transcriptions or records, to exhibit; (e) and to reproduce mechanically.

[4]INT. REV. CODE OF 1954, § 1201 (a).

[5]INT. REV. CODE OF 1954, §§ 1201 (b), 1202.

definition of a capital asset as set forth in the Internal Revenue Code,[6] which defines capital assets as all property held by the taxpayer except for five expressly excluded categories. Two of these exclusions apply to copyright taxation. The first is ". . .property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."[7] An example of this exclusion would arise where the various rights to a play are sold by a playwright as a regular business.[8] In deciding whether the taxpayer holds the copyright primarily for sale to customers, the courts acknowledge that one may hold an asset for more than one purpose.[9] For example, suppose a movie director also sells motion picture rights. Is he a director or a vendor of motion pitcure rights within the meaning of section 1221 (1)? The question turns on whether the rights are held primarily for sale to customers, and this in turn depends on the frequency of such transactions.[10]

The second category expressly excluded from the capital asset definition is:

> (3) a copyright, a literary, musical, or artistic composition, or similar property held by —
>
> (A) a taxpayer whose personal efforts created such property, or
>
> (B) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property . . . .[11]

This provision naturally has had a great impact on copyright taxation because of the large number of copyright transfers made by creators of such works, or taxpayers with the same basis as the creator such as a donee.[12] To avoid confusion in the examination of cases discussed in this article it should be noted that section 1221 (3) was added to the Internal Revenue Code in 1950 and cases prior thereto were not subject to its limitation.

THEORY OF INDIVISIBILITY

Since it is well settled by statute[13] and case law[14] that a copyright

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[6]INT. REV. CODE OF 1954, § 1221.

[7]INT. REV. CODE OF 1954, § 1221 (1).

[8]Goldsmith v. Commissioner, 143 F.2d 466 (2d Cir. 1944), *cert. denied*, 323 U.S. 774 (1944).

[9]Philber Equipment Corporation, 25 T.C. 88 (1955), *rev'd*, 237 F.2d 129 (3d Cir. 1956).

[10]Anatole Litvak, 23 T.C. 441 (1954).

[11]INT. REV. CODE OF 1954, § 1221 (3).

[12]INT. REV. CODE OF 1954, § 1015.

[13]INT. REV. CODE OF 1954, § 1221.

[14]See, *e.g.*, Goldsmith v. Commissioner, 143 F.2d 466 (2d Cir. 1944), *cert. denied*, 323 U.S. 774 (1944).

is a capital asset, provided it is not held primarily for sale to customers or it is not held by the creator or one holding it subject to the same basis as that of the creator, the determinative factor in ascertaining the applicability of capital gains tax treatment is the nature of the transfer. The confusion among the courts in classifying the nature of the transfer of less than all of the bundle of rights in a copyright makes an examination of such transfers the principal concern of this article.

The logical method to ascertain whether the grant of a right constituted a sale or exchange would be to look at all the pertinent aspects of the transaction. The early cases used but one standard to determine whether the transfer was a sale or a license – if all of the copyright was transferred it was a sale; if anything less than all of the rights in the copyright was transferred it was, per se, a license. A typical case is *M. Witmark & Sons v. Pastime Amusement Company*[15] where a copyright holder assigned all the rights to a song except the dramatic rights which he retained. The court held that the copyright of the song included the dramatic rights and any assignment which did not convey these rights was therefore not an assignment of the whole copyright; consequently, the transfer was deemed a mere license, and the right to sue an infringer remained in the proprietor who retained legal title.[16] A copyright was considered an indivisible thing which could not be split and partially assigned either as to time, place, or particular rights, less than the sum of all the rights comprehended in the copyright.[17] This theory of the "indivisibility of the copyright" grew out of the fear that an infringer might be subjected to suit by both the copyright holder and the assignee of a particular right under that copyright. The courts reasoned that in order for the assignee to sue, he must receive the title to the right. Therefore, there would be no danger of two suits for one infringement if the title to the copyright was considered to be indivisible and any partial grant thereunder a license. The acceptance of this doctrine has had far reaching effects and has been followed in the area of patent law[18] as well as copyright law.[19]

While the theory of indivisibility prevailed, a transfer of a single right could never be a sale. And until the procedural justification for limiting infringement suits to the copyright owner was discarded, the theory of indivisibilty of the copyright continued. The procedural justification was finally destroyed in the patent case *Independent Wireless Telegraph Company v. R. C. A.*[20] The Supreme Court of the United

15298 Fed. 470 (E.D.S.C. 1924), *aff'd per curiam*, 2 F.2d 1020 (4th Cir. 1924).
16*Id.* at 473.
17*Id.* at 474.
18*E.g.*, Fmpire City Amusement Co. v. Wilton, 134 Fed. 132 (C.C.D. Mass. 1903).
19*E.g.*, New Fiction Publishing Company v. Star Co., 220 Fed. 994 (S.D.N.Y. 1915).
20269 U. S. 459 (1926).

States held there that the exclusive licensee of a patent can sue an infringer. If the owner of the patent, being within the jurisdiction, refuses or is unable to join an exclusive licensee as plaintiff, then the licensee can make him a party defendant by process and he will be lined up by the court in the party character which he should assume.[21] If the owner is without the jurisdiction and refuses to join suit then he can be brought in as an involuntary plaintiff. This decision was based on a theory of trust, holding the owner and title holder of the patent a trustee for the licensee, to the extent that he had to allow the use of his name as plaintiff in any action brought by the licensee for damages for the infringement of his right.[22] The implied obligation of the licensor to allow the use of his name was indispensable to the enjoyment by the licensee of the monopoly which the licensor had given him. No injustice descended upon the infringer as the decree of the court would save him from a multiplicity of suits.[23]

After the procedural justification for the indivisibility theory was destroyed in patent law, it took little time for the same result to occur in copyright law. In *L. C. Page & Company v. Fox Film Corp.*,[24] the plaintiff, purchaser of the exclusive motion picture rights to a novel, joined the author who owned the copyright in an action against Fox Film Corporation for an infringement of plaintiff's excusive right. The court upheld the exclusive licensee's right to compel the copyright proprietor, as trustee, to sue for infringement regardless of whether the licensee had a contractual right or a proprietary interest in the copyright.[25]

As a result, the original procedural grounds on which the theory of indivisibility of the copyright was based were no longer persuasive. Most courts have rejected the theory,[26] but a few still follow it.[27] At any rate the theory is dying if not yet dead. A transfer of less than all of the rights under a copyright was held to be a sale in *Wodehouse v. Commissioner*.[28] Commenting on the transaction the court said: "[Our decision] rests on the inherent nature of the transfer, and on the further fact that the only ground for the indivisibility theory (that is, the inability of the assignee of a part of a copyright to sue for infringement), has been swept away by the decision of the Supreme Court in *Independent Wireless Telegraph Company v. R. C. A.*"[29]

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[21] *Id.* at 468.

[22] *Id.* at 469.

[23] *Id.* at 474.

[24] 83 F.2d 196 (2d Cir. 1936).

[25] *Id.* at 198.

[26] *E.g.*, Herwig v. United States, 105 F Supp. 384 (Ct. Cl. 1952).

[27] *E.g.*, Local Trademark, Inc. v. Powers, 56 F. Supp. 751 (E.D. Pa. 1944).

[28] 166 F.2d 986 (4th Cir. 1948).

[29] *Id.* at 990.

The destruction of the theory of indivisibility, on analysis, is desirable on several grounds:[30] (1) the everyday business transfers of rights granted by the Copyright Act, more often than not, result in the transfer of a single right to one party who customarily deals in that particular area, and the transfer of another right to another party who handles that type of business; (2) the procedural basis of the theory overlooks the fact that the grantor is estopped from asserting a claim by virtue of his contract with the grantee, thereby preventing two suits against the infringer for one infringement; (3) finally, the only reason for requiring the legal owner of the copyright to be a necessary party is the law of trusts which permits the trustee (owner-grantor) and not the beneficiary (grantee) to sue third parties. This theory begged the question, for it assumed that the copypright could not be split into separate parts.

SALE v. LICENSE

The effect of the decisions handed down in *Independent Wireless Telegraph Co v. R.C.A.*[31] and *L. C. Page & Company v. Fox Film Corp.*[32] on subsequent cases involving the partial transfer of a copyright has been great. Now that the courts are permitted to consider and determine the true nature of a partial assignment, such transfers have been given character by judicial decisions. Some courts noted that the reservation of certain rights in the grantor was not inconsistent with a sale of a property right.[33] Others took notice that a particular copyright right, being inherently and essentially different from the other rights, could be sold.[34] A closer inspection of the purpose of taxation was taken and many courts concluded that they were not so much concerned with the refinements of title as they were with actual command over the property taxed, i.e., the actual benefit for which the tax was paid.[35]

Despite the emergence of the view that an individual right could be sold, there was still a reluctance on the part of some courts to consider a copyright divisible. An interesting case in this respect is *Goldsmith v. Commissioner*[36] where the taxpayer, who was in business as a playwright, granted exclusive motion picture rights to a producer. The question of taxation turned on whether the transfer was a sale en-

[30]Fulda, *Copyright Assignments and The Capital Gains Tax*, 58 YALE L. J. 252 (1944).

[31]269 U. S. 459 (1926).

[32]83 F.2d 196 (2d Cir. 1936).

[33]*E.g.*, Commissioner v. Celanese Corp., 78 App. D.C. 292, *aff'd*, 140 F.2d 339 (D. C. Cir. 1944).

[34]Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642 (C.C.S.D.N.Y. 1906).

[35]Corliss v. Bowers, 281 U. S. 376 (1930).

[36]143 F.2d 466 (2d Cir. 1944), *cert. denied*, 323 U. S. 774 (1944).

titled to capital gains treatment or a license taxable as ordinary income. Judge Chase gave the opinion of the court which held that a copyright owner could separately assign rights which made up a copyright, but when he did, the assignee did not become the owner of the copyright itself and acquired only what lesser rights were granted by terms of the copyright. Unless the assignment conveyed to the assignee the title to the copyright (which it did not according to Judge Chase), no sale of property was made, and therefore the transferee received a mere license and the transaction was taxable as ordinary income. However, in the concurring opinion Judge Learned Hand held that such a transfer of part of the bundle of rights making up a copyright yielded a sale.[37]

Cases subsequent to *Goldsmith* were more decisive. For example, in *Herwig v. United States*[38] the plaintiffs sought to have the transfer of the exclusive motion picture rights to the book "Forever Amber" adjudicated a sale. The court decided that the Copyright Act encompassed a number of separable rights. Then it looked at the everyday business practice of transferring part of a copyright to one party and another part to another party. The court concluded: ". . .[I]t is not only logical but also practical and just to consider the exclusive and perpetual grant of any one of the 'bundle of rights' which go to make up a copyright as a 'sale' of personal property rather than a mere ' license.'"[39] A similar result was reached in *Joseph A. Fields*[40] where the court had to determine the type of grant involved in the transfer of motion picture rights to the plays, "My Sister Eileen" and the "Doughgirls." The court found that while all of the property in the copyright of those plays was not transferred, all of the property in the motion picture rights was transferred. Such a grant was declared to be a "sale."

The same problem has arisen under the section of the Internal Revenue Code which deals with the taxation of nonresident alien authors.[41] Under this section nonresident alien authors are taxed on royalties received from the use of their works in the United States but not for the sale thereof, since the sale occurred out of the United States. It is important, then, to determine whether a sale has occurred or a license granted. One would think that a transfer of part of a copyright would be classified the same regardless of which section in the Internal

[37]However, Judge Hand concluded that the vendor, a playwright, held the interests in the copyright "for sale to customers in the ordinary course of business," and the interests were hence excluded from the definition of a capital asset by virtue of Int. Rev. Code of 1939, § 117 (a) (1) (A).

[38]105 F. Supp. 384 (Ct. Cl. 1952).

[39]*Id.* at 389.

[40]14 T.C. 1202 (1950).

[41]INT. REV. CODE OF 1954, § 871.

Revenue Code imposes a tax liability thereon. But this is not always the case. In *Rohmer v. Commissioner*[42] the court upheld the imposition of a tax on a nonresident alien author who had disposed of some of his literary rights for a lump sum consideration. When confronted with the earlier decision in *Goldsmith v. Commissioner*[43] wherein Judge Hand held that disposition of motion picture rights was a sale, Judge Frank said that because of the different history and purpose behind the Code section[44] dealing with nonresident alien authors, the *Goldsmith decision*, decided under the general Code provision taxing capital gains,[45] had no bearing. The concepts employed in construing one section of a statute are not necessarily pertinent when construing another with a distinguishable background.[46] The court concluded that where a copyright owner transferred to any particular transferee substantially less than the entire "bundle of rights" conferred by the copyright, then payment therefor, whether in one sum or in several payments, constituted royalties within the meaning of section 211[47] and was not a sale.

The United States Supreme Court could have resolved the problem in *Wodehouse v. Commissioner*[48] had it so desired. The Court of Appeals for the Fouth Circuit had held that lump sum payments received in advance by a nonresident alien for exclusive serial rights constituted a sale of those rights. This decision was reversed by the United States Supreme Court, but for other reasons. The majority regarded the question presented as being merely the proper interpretation of section 211,[49] rather than the divisibility of an author's rights. Mr. Justice Frankfurter dissented on the grounds that the transaction constituted a "sale" not taxable within the terms of section 211. He stated:

> To treat the transfer of any one of the various rights conferred by the Copyright Law as a sale would accord not only with analysis of their essential character and the scheme of the Copyright Law, but with the way these rights are treated by authors and purveyors of products of the mind for whose protection the Copyright Law was designed because of the belief that the

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[42]153 F.2d 61 (2d Cir. 1946), *cert denied*, 328 U. S. 362 (1946).

[43]143 F.2d 466 (2d Cir. 1944), *cert. denied*, 323 U. S. 774 (1944).

[44]Int. Rev. Code of 1939, ch. 1, § 211 (a) (1) (A), 53 Stat. 75 (now INT. REV. CODE OF 1954, § 871 (a)).

[45]Int. Rev. Code of 1939, ch. 1, § 117 (a), 53 Stat. 50 (now INT. REV. CODE OF 1954, § 1221).

[46]See Rohmer v. Commissioner, 153 F.2d 61 (2d Cir. 1946), *cert. denied*, 328 U. S. 862 (1946).

[47]Int. Rev. Code of 1939, ch. 1, § 211, 53 Stat. 75 (now INT. REV. CODE OF 1954, § 871).

[48]337 U.S. 369 (1948).

[49]Revenue Act of 1938, ch. 289, § 211, 52 Stat. 527 (now INT. REV. CODE OF 1954 § 871).

> interests of society would be furthered. The various exclusive rights have different attributes and therefore different significance. For that reason they may be sold separately and form the basis for a new copyright.[50]

Of course, this case and the *Rohmer* case deal with a statute which is different from the capital gains statutes with which we are concerned. The inapplicability of case decisions under the nonresident alien statutes to the capital gains statutes, and vice versa, has been pointed out in numerous cases. But considering Mr. Justice Frankfurter's dissent, and the fact that some cases involving capital gain statutes have declared a transfer to be a license on the basis of cases concerning the nonresident alien statute without acknowledging a distinction in that statute, these cases are worthy of note.

CONSIDERATION RECEIVED FOR THE TRANSFER

With the general, if not universal, acceptance of the divisibility concept in copyright law the uncertainty concerning the tax liability on copyright transfers did not disappear. Now that it is recognized that a part of the copyright can be sold, whether a particular grant is a sale or a license is still a question to be answered in each case. The quality of the grant seems to be the determining factor. In the case of a sale the owner parts with ownership of the copyright or of some property right in it, and conveys this property right to another; in the case of a lease or license, the owner retains ownership of the property, but permits another to use it for a limited time or purpose.[51] The test is whether the owner retains ownership of the property right concerned.

One method available for determining the type of transfer is an examination of the consideration given for it. Generally, periodic payments are given for a license, while a single payment is made for a sale. Confusion arises, however, where the interest granted has the characteristics of a sale while the payments in consideration for that interest are similar to royalties, and vice versa. What importance should be given to the nature of the payments in determining the type of transfer has not been settled.

The majority of the courts has classified the transaction according to the quality of the interest granted, and has given little consideration, if any, to the nature of the payments received therefor when the two are at odds. One of the first cases which involved this problem was *Sabatini v. Commissioner*.[52] The court had to determine whether a lump sum payment received for motion picture rights for a stated period constitu-

[50]Wodehouse v. Commissioner, 337 U.S. 369, 424 (1948).

[51]Gershwin v. United States, 153 F. Supp. 477 (Ct. Cl. 1957).

[52]98 F.2d 753 (2d Cir. 1938).

ted ordinary income given for a license or capital gains resulting from a sale of an asset. It was held that there was no transfer of title necessary to a completed sale and therefore the transfer was a license. The fact that one lump sum was received for the privilege of using the property of the author instead of a series of payments did not alter the real character of the rights the taxpayer received. It was payment for the use of his literary property and was taxable as royalties paid in advance. The court admitted the lack of direct authority for this view but believed it correct in principle.[53]

Virtually the same position was taken in *Rohmer v. Commissioner*,[54] another case involving the taxation of a nonresident alien. This case, as well as the *Sabatini* case,[55] followed the theory of indivisibility and thereby classified the partial transfer of the copyright as, per se, a license. Nevertheless, the complexity created by a lump sum payment was recognized and discussed at length. The court held the transfer a license and found the payment for it was measured by reference to the future use of the license. Although payments for licenses are often payable in installments, the money received is none the less a royalty when disbursed in a single amount. In discussing the lump sum payment a parallel was made to rent paid in advance for the use of a building for a period of years. Since such a payment of rent would be taxable as ordinary income, the court considered the lump sum payment for a license as entitled to the same treatment.

The two foregoing cases involved lump sum payments in advance; *Richard L. Telinde*[56] involved a transfer of a copyright for an indeterminate amount. In consideration for his copyright the author was to receive "royalties" amounting to ten percent of the list price on sales of his works in the United States and five percent of the list price upon copies sold in foreign countries, and in lieu of royalty on privileges of reprint the author was to be given fifty percent of sums received from those sales. In declaring the transfer to be a sale, the court was of the opinion that it was too well settled to admit of any discussion that the mere payment of a consideration on the basis of sales, or otherwise in a fashion referred to as "royalties", did not suffice to transmute what would otherwise be a sale into a mere license. In *Bessie Lasky*[57] another variation of payment was under consideration. The taxpayer made arrangements to have his shares of the gross film rentals of a picture accrue. He then sold the right to the accrued shares maintaining that

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[53]*Id.* at 755.

[54]153 F.2d 61 (2d Cir. 1946), *cert. denied*, 328 U.S. 862 (1946).

[55]Sabatini v. Commissioner, 98 F.2d 753 (2d Cir. 1958).

[56]18 T. C. 91 (1952).

[57]22 T.C. 13 (1954).

the money received for the sale of the right to the accrued shares should be given capital gains treatment. The court found the alleged "sale" of the right to receive the accruals did not convert ordinary income into capital gains.

The cases discussed up to this point, which constitute the majority view, have emphasized the interest transferred and given little significance to the type of payment received. A minority of courts has, on the other hand, stressed the importance of the consideration in classifying the transfer. *Local Trademarks, Inc. v. Powers*[58] gives principal consideration to the quality of the payments. In that case a grant of the exclusive right to use the copyrighted "Miss Flora" series of newspaper advertisements was made on the condition that the grantee pay $400 therefor. This was to be accomplished by paying five percent of the net proceeds of the sales of advertisements until the $400 should be paid in full, whereupon the grantee would acquire full title to the copyright material. The court held that until the stipulated payment was made in full there was but a license. After the full payment the grantee was considered to be the owner of the copyright and the transfer was deemed a sale. The underlying rationale contemplated a condition subsequent attached to the granting of the exclusive right, to wit, the paying of the $400.

Another interesting decision which investigated the nature of the payment was handed down in *Cory v. Commissioner*.[59] The taxpayer gave Scribners only a part of the bundle of rights inhering in the copyright, since he assigned neither foreign publishing rights nor movie or dramatic rights. The payments were to be measured by the future sales of the book. The Court of Appeals for the Second Circuit termed the transfers a license, stating: "We do not now decide that a transfer by a citizen of but a part of the bundle of rights for a definite sum, or a transfer of the whole for an indeterminate sum, is a sale for the purposes of § 117.[60] We do hold that when, as here, the transfer is both (1) a transfer of a part of the cluster of rights and (2) for an amount wholly indeterminate at the time of the transfer, no such sale occurs."[61] The court was noncommittal as to whether either situation alone was determinative of the tax treatment to be given. However, it did imply that each one should be given consideration. In *Gershwin v. United States*[62] the court commented on the *Cory* case saying "the receipts in *Cory v.*

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[58]56 F. Supp. 751 (E.D. Pa. 1944).

[59]230 F.2d 941 (2d Cir. 1956), *cert. denied*, 352 U.S. 828 (1956).

[60]Int. Rev. Code of 1939, ch. 1, § 117 (a), 53 Stat. 50 (now INT. REV. CODE OF 1954, § 1221).

[61]Cory v. Commissioner, 230 F.2d 941 (2d Cir. 1956), *cert. denied*, 352 U.S. 828 (1956).

[62]153 F. Supp. 477 (Ct. Cl. 1957).

Commissioner were held to be taxable as ordinary income only because the consideration was indeterminate, depending on sales by the transferee. It is implicit in that opinion, however, that the transaction would have been a sale had the consideration been for a definite sum, not contingent on the revenue derived from use."

REVENUE RULINGS

In examining the tax consequences of copyright transfers, a look at the applicable Revenue Rulings is informative, for they are indicative of the trend of official opinion of the Internal Revenue Service. The Rulings do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but do provide precedents to be used in the disposition of other cases and may be relied upon for that purpose. Several Revenue Rulings have dealt with the subject of this article. In a 1933 Revenue Ruling[63] the Commissioner ruled in substance that a copyright constituted a single unit and that any rights granted thereunder by the author were merely licenses. It was also said that payment in the nature of a rent or royalty in a lump sum rather than so much per annum, per unit of property, or percentage of receipts does not alter the character of the payment as rent or royalty.

In 1954, a Revenue Ruling[64] modified the 1933 Ruling insofar as it held that copyrights were incapable of division into separate properties. It then said:

> A grant of less than all of a copyright proprietor's right may confer a license or constitute a transfer of property. A grant of the exclusive right to exploit a copyright work in a medium of publication throughout the life of the copyright transfers a property right; a grant of less confers a license. If the consideration received for a grant transferring a property interest is not measured by a percentage of the receipts from the sale, performance, or publication of the copyrighted work, is not measured by the number of copies sold, performances given, or exhibitions made of the copyrighted work, and is not payable periodically over a period generally coterminous with the grantee's use of the copyrighted work, it is to be treated as proceeds and not as rentals or royalties.

Thus, a considerable change was reflected here in the Commissioner's standards, since now a sale was possible even if only in limited circumstances.

The 1954 Ruling was further modified by a 1960 Ruling[65] which went one step further:

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[63]I.T. 2735, XII-2 CUM. BULL. 131 (1933).

[64]Rev. Rul. 54-409, 1954-2 CUM. BULL. 174 (1954).

[65]Rev. Rul. 60-226, 1960 Int. Rev. Bull. No. 25, at 8.

> The consideration received by a proprietor of a copyright for a grant transferring the exclusive right to exploit the copyrighted work in a medium of publication throughout the life of the copyright shall be treated as proceeds from a sale of property, regardless of whether the consideration received is measured by a percentage of the receipts from the sale, performance, exhibition, or publication of the copyrighted work, or is measured by the number of copies sold, performances given, or exhibitions made of the copyrighted work, or whether such receipts are payable periodically over a period generally coterminous with the grantee's use of the copyrighted work.

This represents a sound basis for differentiating between a sale and a license, and if it is followed will be a great aid in resolving the confusion arising from the taxation of copyright transfers.

PATENTS AND TRADEMARKS

An examination of transfers in the patent and trademark areas lends assistance toward a better understanding of similar copyright transactions. Since the basic nature of copyrights, patents and trademarks is the same, i.e., grants of monopolies for a fixed period of time by the government as a reward for the particular genius of the one receiving the grant, it would seem that the rights granted in connection with any one of them should be treated the same in law. In the field of patent law[66] as well as the trademark[67] field the courts have considered the retention of the mere legal title by the grantor as immaterial. Whether the beneficial interest was transferred is the question to be resolved. The mere reservation of rights in the patent grantor is not inconsistent with a sale of a property right.[68] However, as in copyright law, some cases still treat the transfer of less than all of the patent rights to be, per se, a license.[69] The importance to be given the method of payment in determining the type of patent transfer to be taxed has been shown by the cases[70] and Revenue Ruling.[71] Accordingly, the consideration received by the owner of a patent for the assignment of the patent may be treated as the proceeds of a sale of property, for federal income tax purposes, even though the consideration received by the transferor was measured by production, use, or sale of the patented article. The Revenue Ruling which extended virtually the same treatment to copyright taxation[72] stated that one of the motivating considerations for doing so was the acceptance of that treatment in patent law.

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[66] *E.g.*, Parke, Davis & Co., 31 B.T.A. 427 (1934).

[67] *E.g.*, Seattle Brewing & Malting Co., 6 T.C. 856 (1948).

[68] *E.g.*, Wing Engineering Corp. v. United States, 151 F. Supp. 314 (Ct. Cl. 1957).

[69] *E.g.*, Broderick v. Neale, 201 F.2d 621 (10th Cir. 1953).

[70] *E.g.*, Leonard Coplan, 28 T.C. 1189 (1957).

[71] Rev. Rul. 58-353, 1958-2 CUM. BULL. 408 (1958).

[72] See note 65.

SUMMARY

The history of tax liability on money realized from the transfer of a right embodied in the Copyright Act indicates that the present uncertainty is not a recent development. The question of the existence of a license as opposed to a sale, which in turn determines whether capital gains or ordinary income taxation is applicable, has never been settled. With the abandonment of the theory of indivisibility by the majority of the courts, the matter has become complex. For now that it is theoretically possible to have either a license or a sale of a right, the difference between the two must be determined. It is necessary to examine the quality of the interest transferred and the payment received therefor, and to weigh the importance to be given to each. Courts do not agree on the standards to be used. As a result no single formula can be given to solve the question of tax liability on a copyright transfer. However, by examining the more recent cases, the evolution of the Revenue Rulings, and the development in trademark case law, the trend appears to be toward classifying as a sale any transfer conveying all the property in a single right for the duration of the copyright, even where the payment therefor is periodic or indeterminate. This approach seems a logical one and should in time be widely accepted.

Walker L. Watters

RECENT DECISIONS

Bankruptcy — Rights of Trustee under Section 70c of Bankruptcy Act Determined from Date of Filing Petition

Bankrupt borrowed money from respondent on November 4, 1957, giving as security a chattel mortgage on an automobile. In Michigan, where the transaction took place, mortgages were void against creditors unless filed.[1] This mortgage was not filed until November 8, 1957. On April 8, 1958, borrowers filed a voluntary petition in bankruptcy and an adjudication followed, petitioner being named trustee in bankruptcy. Trustee moved to have the mortgage invalidated under section 70c of the Bankruptcy Act.[2] The evidence showed no credit was extended to borrower during the four day interval between execution and recordation of the mortgage. The referee in bankruptcy ruled that section 70c gives the trustee the rights of a creditor who could have obtained a lien at the date of bankruptcy whether or not such a creditor exists. He concluded that under Michigan law a creditor would have had a right superior to that of the mortgagee had he extended credit during the four day period when the mortgage was not recorded and that therefore the trustee could claim the same right, even though in fact there was no such creditor. The district court reversed the referee and the court of appeals affirmed. Held: Affirmed. Under section 70c of the Bankruptcy Act, the rights of creditors—whether existing or hypotheical—to which the trustee succeeds are to be ascertained as of the date the petition in bankruptcy is filed, not at an anterior point of time. *Lewis v. Manufacaturers National Bank of Detroit,* 81 Sup. Ct. 347 (1961).

Section 70c of the Bankruptcy Act provides that a trustee in bankruptcy, as to all property upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings, shall be deemed vested as of the date of bankruptcy "with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."[3] This provision, often referred to as the "strong-arm clause" is one of the important avoiding powers of the trustee.[4] The language of the section would seem to compel the result of the noted case, but an earlier dcision, with similiar facts, held a mortgage invalid against the trustee on the ground that the trustee had the rights that a hypothetical creditor might have obtained at a date prior to the filing of the petition in bankruptcy.[5] This 1954 decision has been severely criticized,[6] for it allowed the trustee to attack secured transactions entered into in good faith before bankruptcy and produced the result that a secured creditor lost his security if there was any lapse in recordation available to hypothetical intervening cre-

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[1]Mich. Stat. Ann. ch. 261, §26.929 (1953).

[2]66 Stat. 429 (1952), 11 U.S.C. §110, sub. c. (1958).

[3]*Ibid.*

[4]See generally 4 Collier, Bankruptcy §70.51 (14th ed. Supp. 1960).

[5]Constance v. Harvey, 215 F.2d 571 (2d Cir. 1954).

[6]See, *e.g*, Marsh, *Constance v. Harvey — "The Strong-Arm Clause" Re-Evaluated,* 43 Cal. L. Rev. 65 (1955).

ditors under applicable state law. Thus, the power of the trustee was limited only by his ability to imagine some right of a creditor which might have been interposed between execution of the mortgage and its recordation.[7] Furthermore, it has been said that the policy of the Bankruptcy Act did not require the construction given in the 1954 decision because section 70e enables the trustee to take over the right of an actual creditor to avoid an imperfect transfer.[8] The doctrine of the 1954 decision would render section 70e useless, but the decision was followed nonetheless.[9]

The present case refused to allow the trustee to set aside a transaction which no creditor could have avoided and which injured no creditor. The Court stated that the doctrine of the 1954 decision would result in upsetting good-faith security transactions entered into months or years before bankruptcy where there was only a very slight delay in recording and that this would be too great a power to give to the trustee.

It is submitted that the instant decision is sound and in accord with the language of section 70c. It protects secured creditors from what has been termed the "statutorily unwarranted status"[10] which the trustee had enjoyed under the earlier decision, and it will give needed stability to security transactions where there is a slight lapse in recordation. It is believed that the power of the trustee under section 70c is adequate to cut off liens that were still imperfect when the petition in bankruptcy was filed.

Samuel E. Scott

Child Support Payments — Contractual Liability of Father's Estate

Minor child, by guardian, brought this action against the administratrix of her father's estate for support payments claimed under a contract between the child's father and mother, later incorporated in a separation and support decree, which provided for stated monthly payments to the wife for the support of the child, with the provision that the payments were to cease when the child reached her 21st birthday, married, died or ceased to live under her mother's supervision. The lower court held that liability for subsequent payments did not survive the father's death. Held: Affirmed. In the absence of express terms or fair implication to the contrary, liability under a contract to provide support to minor children does not survive the father's death and no such "fair implication" could be found in this case. *Lewis v. Lewis*, 125 So. 2d 286 (Miss. 1960). (5-4 Decision. Holmes, Hall, Ethridge and Arrington, JJ., dissenting).

A conflict of authority exists as to the liability of a father's estate

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[7]H.R. Rep. No. 745, 86th Cong., 1st Sess. 8-9 (1959).

[8]*Ibid.*

[9]*E.g.*, Conti v. Volper, 229 F.2d 317 (2d Cir. 1956). *Contra*, Bonner v. First National Bank of Athens, 248 Fed. 692 (5th Cir. 1918).

[10]H.R. Rep. No. 745, *supra* note 7.

to pay child support payments coming due after his death. Many states hold that a provision in a divorce decree for the support of children has no effect beyond the life of the party bound.[1] Other jurisdictions rule that the court may frame the decree so that the support payments will be binding on the father's estate, but whether this is done depends on the interpretation of the decree.[2] At least three states hold that support provisions in the decree are binding after the father's death unless a contrary intention is clearly manifested in the decree.[3] A recent Mississippi decision announced that the decree could not bind the estate: ". . .the liability of the father. . .does not survive his death in the absence of a contract or agreement imposing such liability."[4] This was a case of first impression in Mississippi, so far as such liability to the child is concerned.

The question in the instant case is whether the contract involved is one which will bind the estate — a question of interpretation. Courts have construed a promise to support a child "during minority" as valid and binding on the estate, there being no express provision as to the effect thereon of the father's death.[5] It was noted in another decision that the mentioning of other eventualities, such as the death of the child, called for the reasonable assumption that the death of the father was contemplated, and that in such event there was no implied intention that his death should operate as a condition subsequent terminating the duty of the father to provide further support.[6] The same result was reached where the father's liability for support ended when the child "reaches the age of 21 years, or dies, whichever shall first occurr."[7] Research has revealed only two cases in recent reports which support the proposition of the instant case that liability after death, claimed under a child support contract, must be based on express terms or necessary implications of the contract.[8]

It is submitted that though the court, in the absence of a contract, can provide no legal obligation by a support decree in favor of the child after the father's death, the interpretation of a contract should not be affected by that rule. The Mississippi court's reasons for refusing to allow a decree to bind the father's estate may well be sound. The court felt that such a power would impede the administration of estates, delay the closing of estates and restrict an individual's testamentary

[1]*E.g.*, Robinson v. Robinson, 131 W. Va. 160, 50 S.E.2d 455 (1948).

[2]*E.g.*, *In re* Moore's Estate, 34 Tenn. App. 131, 234 S.W.2d 847 (1950).

[3]Taylor v. George, 34 Cal. App. 2d 552, 212 P.2d 505 (Sup. Ct. 1949); Edelman v. Edelman, 65 Wyo. 271, 199 P.2d 480 (1948); West v. West, 241 Mich. 679, 217 N.W. 924 (1928).

[4]Mahafey v. First National Bank, 231 Miss. 798, 97 So. 2d 767 (1957).

[5]*E.g.*, *In re* Estate of Fessman, 386 Pa. 447, 126 A.2d 676 (1956).

[6]Flicker v. Chenitz, 55 N.J. Super. 273, 150 A.2d 688 (App. Div. 1959).

[7]Ramsey v. Sims, 209 Ga. 228, 81 S.E.2d 639 (1952).

[8]Gordon v. Gordon, 90 App. D.C. 280, *aff'd per curiam*, 195 F.2d 779 (D.C. 1952); Carry v. Johnson's Estate, 185 Misc. 352, 56 N.Y.S.2d 771 (Surr. Ct.), *aff'd*, 270 App. Div. 793, 59 N.Y.S.2d 604 (1946) (two justices dissenting), Mem. 295 N.Y. 857, 67 N.E.2d 260 (1946). But see *in re* Van Arasuar's Will, 190 Misc. 968, 75 N.Y.S.2d 487 (Surr. Ct. 1947).

rights.[9] However, if the court recognizes the father's power to bind himself after death, these reasons are not material in determining his contractual intention, since obviously one may obligate himself by contract to a much greater extent than he can be obligated by a judicial decree. As reasoned in a recent Florida case which supports the submitted proposition, if a father can create a continuing debt in favor of strangers, why is not a debt to his children equally effective?[10] The inconvenience in the administration of estates is certainly no greater when the contractual right is that of a child rather than of a stranger. The maximum length of the obligation (usually until the child reaches 21) can be ascertained and a sum to provide such an annuity set aside. Testamentary rights of any individual are subordinate to obligations he has voluntarily created by valid contracts. The court by interpretation seems to limit contractual obligations to the child for the same reasons it previously limited legal obligations created by decree. It makes contracts for the support of children an additional exception to the rule that contracts are binding after the contractor's death in the absence of expressed or implied contrary intentions. In drafting child support contracts, it would be prudent for Mississippi lawyers to expressly provide for liability after the father's death.

J. H. Hogue, Jr.

CONSTITUTIONAL LAW — DESEGREGATION PLAN FOR PUBLIC SCHOOLS

In compliance with a court order to desegregate the schools under their jurisdiction "with all deliberate speed," the Dallas Independent School District presented two plans to the district court for approval. Plan No. 1 was a twelve year plan of desegregation starting with the first grade and proceeding by the desegregation of one additional grade a year, but allowing a student to transfer when he would otherwise be required to attend a school previously serving students of the other race only. Plan No. 2 provided for the separating and grouping of the schools into white, negro, and mixed schools, and for canvassing parents and pupils in order to learn who wants integration. HELD: Plan No. 2 rejected and Plan No. 1 approved as amended. The burden of showing the speed necessary in the public interest in good faith compliance with desegregation order rests with the school board, and any plan which would continue the practice of enforced segregation is in violation of the equal protection clause of the fourtheenth amendment. *Boston v. Rippy,* 285 F.2d 43 (5th Cir. 1960).

Since the first 1954 decision[1] declaring segregated schools unconstitutional, the courts have been in a quandary as to how the decision should be carried out. In a second opinion[2] the court set forth a plan for implementing desegregation of public schools by requiring the defen-

[9]Mahaffey v. First National Bank, 231 Miss. 798, 97 So. 2d 767 (1957).

[10]Simpson v. Simpson 108 So. 2d 632 (Fla. Dist. Ct. App. 1959).

[1]Brown v. Board of Educ., 347 U.S. 483 (1954).

[2]Brown v. Board of Educ., 349 U.S. 294 (1954).

dants to make a "prompt and reasonable start toward full compliance"[3] with the court's ruling with "all deliberate speed."[4] In the same decision the court placed the primary responsibility on the school authorities for implementing the governing constitutional principles, and reserved to the courts the right to "consider whether the action of school authorities constitutes good faith implementation."[5]

It is apparent that any plan requiring option elections as to the continuation or the abolition of dual schools systems would be unconstitutional since enforcement of constitutional rights cannot be made contingent upon the result of any election.[6] Furthermore, any plan which has racial classification as a basis of school segregation is in violation of the equal protection clause of the Constitution. However, it should be remembered that the Constitution does not require integration.[8] Neither does it forbid voluntary segregation, but it does forbid the use of governmental power to enforce segregation.[9]

The responsibility for devising acceptable plans for desegregation is upon the local school boards, and a period of transition varying according to the conditions in the community will be allowed.[10] The school officials must keep the welfare of the students and the requirements of the school system in mind during the transition period. If the law required that the doors be opened for admission on a "first come, first served" basis, there would soon be no order and no school system.[11] "[T]he court is entitled to require that the enjoyment of the right to desegregate be geared to a reasonable, definitive, transitional program of all deliberate speed."[12] During the transitional period, if the school authorities have acted and are proceeding in good faith, their actions will not be set aside by the courts.[13] It is interesting to note, however, that since the school officials are agents of the state, the Court will not allow them to assert their good faith as an excuse when compliance has been prohibited by the actions of other state officials.[14] It must be remembered that the district court retains jurisdicition in all desegregation cases and has the power to see that the plan is accelerated if it is too deliberate.[15] In a recent Virginia decision where a year and a half had passed since the order to desegregate had been entered and no steps

[3] *Id.* at 300.

[4] *Id.* at 301.

[5] *Id.* at 299.

[6] *Cf.*, Buchanan v. Warley, 245 U.S. 60 (1917).

[7] *E.g.*, Parish School Bd. v. Bush, 242 F.2d 288 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957).

[8] *E.g.*, Aaron v. Tucker, 186 F. Supp. 913, 932 (E.D. Ark. 1960).

[9] *E.g.*, Briggs v. Elliott, 132 F. Supp. 776-77 (E.D. S.C. 1955) (per curiam).

[10] Dove v. Parham, 181 F. Supp. 504, 514 (E.D. Ark. 1960).

[11] See Aaron v. Tucker, 186 F. Supp. 913, 932 (E.D. Ark. 1960).

[12] *Ibid.*

[13] *E.g.*, Aaron v. Cooper, 143 F. Supp. 855, 864-65 (E.D. Ark. 1957), *aff'd*, 243 F.2d 361 (8th Cir. 1957).

[14] See Cooper v. Aaron, 358 U.S. 1 (1958).

[15] *E.g.*, Kelley v. Board of Educ., 270 F.2d 209, 228 (6th Cir. 1959), *cert. denied*, 361 U.S. 924 (1959).

had been taken to comply with the order, the school board was ordered to accept applications for the admission to white schools on a nonracial basis at the earliest practicable date.[16] "The burden rests upon the school officials to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."[17]

In the present case the court upheld the twelve-year stair-step plan,[18] but emphasized that it did not mean to approve the plan "insofar as it postpones full integration."[19] If the school board cannot show that any beneficial use can be made of such delay,[20] then the district court could order immediate steps to be taken.[21] The court struck out the provision allowing students to transfer for racial reasons. Student reassignment laws are constitutional[22] and students may be separated according to their degree of advancement or retardation or for any other legitimate reason,[23] "but each child is entitled to be treated as an individual without regard to his race or color."[24]

It is apparent that the courts will uphold any reasonable plan for desegregating the schools so long as no one is denied the right to attend the school of his choice because of his race. The courts realize that desegregation is not to be accomplished overnight, but they demand that the school authorities make a good faith attempt to comply with the court's ruling. Because of the existing local conditions in various states, some programs will necessarily be shorter, some programs may be longer than the twelve-year scheme upheld in the noted case.

Richard M. Edmonson

Constitutional Law — Fourteenth Amendment — Exclusion by Private Enterprise — Disorderly Conduct and Police Ejection

Appellants, three whites and one Negro, entered a privately-owned amusement park in Baltimore, which as a business policy excluded Negroes. Apparently, entry was free of charge. Appellants refused to leave though requested to do so many times by a park employee. A crowd gathered and its apparent hositility to appellants caused park employees,

[16]Allen v. County School Bd., 266 F.2d 507 (4th Cir. 1959). See also Rippy v. Borders, 247 F.2d 268 (5th Cir. 1957).

[17]Brown v. Board of Educ., 349 U.S. 294 (1954).

[18]*But see* Evans v. Buchanan, 172 F. Supp. 508 (D. Del. 1959).

[19]Boston v. Rippy, 285 F.2d 43, 47 (5th Cir. 1960).

[20]See Board of Norfolk v. Beckett, 260 F.2d 18 (4th Cir. 1958) (per curiam).

[21]See Allen v. County School Bd., 266 F.2d 507 (4th Cir. 1959) (per curiam), *cert. denied,* 361 U.S. 830 (1959).

[22]Aaron v. Tucker, 186 F. Supp. 913 (E.D. Ark. 1960). *But see* Farley v. Turner, 281 F.2d 131 (4th Cir. 1960).

[23]Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957). *But see* Hamm v. County School Bd., 263 F.2d 226 (4th Cir. 1959) (per curiam).

[24]Borders v. Rippy, *supra* note 23.

fearful of mob action, to summon Baltimore police. The police, at the express direction of the park manager, requested appellants to leave. They refused even when arrest was threatened. After arrest, appellants resisted removal by locking arms and had to be shoved or carried off the premises by the police. The Circuit Court for Baltimore County convicted appellants, under a state statute,[1] of disorderly conduct by disturbing the peace in a place of public resort or amusement. HELD: Affirmed. The arrest was not unconstitutional state-enforced segregation because the park could lawfully exclude persons as a private business policy, eject those who refuse to leave after request, and enlist police aid in removing such trespassers. Inciting a crowd by refusal to leave was disorderly conduct. *Drews v. State,* 167 A.2d 341 (Md. 1961).

The prohibitions of the fourteenth amendment apply to state action,[2] but not to private action,[3] and there exists a "gray area" where the courts have sought to distinguish one from the other.[4] The treatment herein will be confined to discrimination by a local, private enterprise which did not abridge a positive federal right and which was controlled by common law. No consideration will be given such complicating factors as interstate commerce,[5] state public enterprise,[6] abridgement of a positive right which has been read into the fourteenth amendment,[7] or states statutes prohibiting private discrimination.[8] Generally, the acts of law enforcement officers[9] and of courts[10] are acts of the state, and cannot enforce discrimination. However, at common law, local private businesses can select patrons as they may desire[11] and such selection is not unconstitutional.[12] The United States Supreme Court has recognized that breach-of-peace statutes are not unnecessary and has defined disorderly conduct in a manner similar to the definition used in the principal case.[13]

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[1]MD. ANN. CODE art. 27, § 123 (1957).

[2]Civil Rights Cases, 109 U.S. 3 (1883).

[3]*E.g.,* Shelley v. Kraemer, 334 U.S. 1 (1948).

[4]See generally LEWIS, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960).

[5]For discussion of Congressional powers to prevent discrimination as a burden on interstate commerce, see, *e.g.,* Boynton v. Virginia, 81 Sup. Ct. 182 (1960); Mitchell v. United States, 313 U.S. 80 (1941).

[6]See, *e.g.,* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949). (state encouragement of private enterprise held not state enterprise), *cert. denied,* 339 U.S. 981 (1950).

[7]See, *e.g.,* Marsh v. Alabama, 326 U.S. 501 (1946).

[8]See, *e.g.,* MICH. STAT. ANN. tit. 28 §§ 28, 343-4 (Supp. 1959). See also Western Turf Association v. Greenberg, 204 U.S. 359 (1907) (upholding such statutes as exercise of state police power).

[9]*E.g.,* Screws v. United States, 325 U.S. 91 (1945).

[10]*E.g.,* Shelley v. Kraemer, 334 U.S. 1 (1948).

[11]*E.g.,* Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 153, 134 N.E.2d 371, 373 (1956).

[12]*E.g.,* Browder v. Gayle, 142 F.Supp. 707, 715 (M.D. Ala.) (dictum), *aff'd per curiam,* 352 U.S. 903 (1956).

[13]See Cantwell v. Connecticut, 310 U.S. 296, 308-09 (1940).

The right of a private enterprise to exclude has been recognized in the case of restaurants[14] and amusement parks;[15] such a right is the basis for allowing proprietors to summon police aid in ejecting unwanted persons.[16] Some decisions hold that persons may be guilty of disorderly conduct when their actions, though not unlawful, arouse resentment in bystanders and generate a potential breach of peace.[17] In Mississippi, a positive right is given to proprietors in choosing and refusing patrons; refusal to leave after a request is a trespass, and, of course, would justify police ejection.[18] Mississippi is also well-provided with statutes in the areas of disorderly conduct and breach of peace.[19] These are rather comprehensive, but seem to be specific enough in wording to avoid invalidation for vagueness.

The rule upholding the right of a proprietor to enlist police aid in ejecting trespassers seems sufficiently well grounded to endure close constitutional scrutiny. To reject it, a higher court would be forced to greatly extend the definition of "public enterprise," or adopt a coarse rule which recognizes the right of the proprietor to remove a trespasser but denies him the assistance of the police in removal. Disorderly conduct, however, might prove an unsubstantial ground for the decision. The aggressive action of appellants was met by kicks and threats from members of the crowd and yet, apparently, none were arrested for similarly disturbing the peace.[20] It must be observed, as regards disorderly conduct, that there is always the possibility that a law valid on its face may be found to have been discriminatorily applied.[21]

John M. Roach

Constitutional Law — Organization Lists Required of Teachers Violates Fourteenth Amendment

Action was brought by schoolteachers and others challenging unsuccessfully the constitutionality of an Arkansas statute which provided that all teachers in the public schools should file affidavits giving names and addresses of all organizatons to which they had belonged or contributed within the preceding five years as a prerequisite to employment. Held: Reversed. A statute requiring all public school teachers, hired on a year-to-year basis, to file an affidavit listing every organization to which they have belonged or contributed within the preceding five years

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[14]*E.g.*, Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959).

[15]Fletcher v. Coney Island, Inc., 165 Ohio St. 150, 134 N.E.2d 371 (1956); *cf.* Griffin v. Collins, 187 F.Supp. 149 (D.Md. 1960) (denial of preliminary injunction).

[16]Griffin v. Collins, *supra* note 15, at 153-54.

[17]See, *e.g.*, People v. Burman, 154 Mich. 150, 117 N.W. 589 (1908). Compare Feiner v. New York, 340 U.S. 315 (1951).

[18]Miss. Code Ann. § 2046.5 (1956). See also §§ 2409.5, 2409.7 (Supp. 1960).

[19]Miss. Code Ann. §§ 2087.5, 2087.7, 2089.5 (Supp. 1960), 2090.5, 2469, 2470, 7156 (1956).

[20]Drews v. State, 167 A.2d 341, 344 (Md. 1961).

[21]See, *e.g.*, Norris v. Alabama, 294 U.S. 587, 589 (1935).

is a deprivation of freedom of association in violation of the fourteenth amendment. *Shelton v. Tucker,* 81 Sup. Ct. 247 (1960).

There is no doubt that the interest of the state government was legitimate in this case since the states have the authority to inquire into the fitness and competency of public school teachers,[1] and classroom conduct need not be "the sole basis for determining. . . fitness."[2] Freedom of association has only recently been expressly incorporated into the fourteenth amendment.[3] Where individual liberties are in conflict with public interests, it is not uncommon for the Court to balance conveniences.[4] In this case, however, the Supreme Court found it unnecessary to consider the conflict of interests, and as on previous occasions,[5] struck down the statute as invalid on its face on the ground that it went beyond that which was necessary to achieve a legitimate government purpose. In regard to the requirements demanded of public school teachers, the Supreme Court has upheld legislation with more specific aims.[6] It has determined that a state statute requiring the organization lists of secret associations to be filed with state officials is constitutional.[7] More specifically, it has held recently that a "governmental interest outweighs individual rights in an associational privacy"[8] where attendance lists of a summer camp were ordered to be produced for a legislative investigation. The Arkansas statute at issue in the noted case was ruled invalid because the majority felt that the "same basic purpose" could be achieved by "less drastic" legislation.[9] Yet, there is always a presumption in favor of the constitutionality of a statute.[10] "One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."[11]

The avowed purpose of this legislation was to assist in the administration and financing of the public schools.[12] This is not only a legitimate governmental function, it is also the duty of the state legislatures to make provisions to meet this end. As is noted in the dissent, this statute is not impermissibly broad in the same sense as were those in other cases[13] previously before the court, nor do past decisions imply that the court has the right "to substitute its own choice among alternatives for that of a state legislature" or to restrict the state legislatures "to the 'narrowest' workable means of accomplishing an end."[14] Is this statute a

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[1]See, *e.g.*, Alder v. Board of Education, 342 U.S. 485 (1952).

[2]Beilan v. Board of Education, 357 U.S. 399, 406 (1958).

[3]NAACP v. Alabama, 357 U.S. 449 (1958).

[4]See, *e.g.*, Uphaus v. Wyman, 360 U.S. 72 (1959).

[5]See, *e.g.*, Talley v. California, 362 U.S. 60 (1960).

[6]Beilan v. Board of Education, 357 U.S. 399 (1958).

[7]Bryant v. Zimmerman, 278 U.S. 63 (1928).

[8]Uphaus v. Wyman, 360 U.S. 72 (1959).

[9]Shelton v. Tucker, 81 Sup. Ct. 247, 252 (1960).

[10]Graves v. Minnesota, 272 U.S. 425 (1926).

[11]Union Pac. R.R. v. United States, 99 U.S. 700, 718 (1878).

[12]ARK. STAT. ANN. § 1229 (1958).

[13]See, *e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

[14]Shelton v. Tucker, 81 Sup. Ct. 247, 255 (1960).

reasonable one in light of the fact that the state does have a legitimate governmental interest in the subject matter involved? Four members of the Supreme Court felt that it was. If not, where is the line to be drawn between that inquiry which is permissible and that which is not? Certainly the majority gives us no clue, yet they unhesitatingly strike down the statute on its face despite the fact that the same could have been considered at a later date by the Court when a complete picture, including the statute and its administration, could have been presented before that body.[15] Such action would have been more in accord with the previous rulings of the Supreme Court. Where lies that presumption of constitutionality which "must prevail in the absence of some factual foundation of record for overthrowing the statute,"[16] or the idea that "within the field where men may reasonably differ the Legislature must have its way"?[17] Mississippi has a statute that is almost identical to that of Arkansas,[18] and the decision noted leaves it beyond doubt that the former will be invalidated if contested.

Lucius Featherston Sams, Jr.

Criminal Law — Assault and Battery Committed in The Defense of Another Person

The defendant saw two men assaulting a youth on the streets of New York during mid-afternoon, and believing that an unlawful assault and battery was being committed, intervened in defense of the youth. Unknown to the defendant, the two men were plainclothes policemen who were attempting to arrest the youth for his participation in a street incident. In the ensuing struggle, one of the plainclothes policemen became entangled with the defendant and fell, suffering a broken leg. He then drew a revolver, announced that he was a police officer, and arrested the defendant, who was later tried and convicted of criminal assault. Held: Reversed. One has the right to intervene in defense of another when he reasonably believes that the other is being unlawfully assaulted. *People v. Young*, 210 N.Y.S.2d 358 (App. Div. 1961) (3-to 2 decision).

The rule allowing one to intervene in defense of another only in special relationships such as husband-wife, parent-child, master-servant, and principal-agent has been expanded today so that, "The privilege to use force for the prevention of crime is unlimited in regard to the person who may be benefited by the intervention, but limited as to the type of offense to which it applies. . . ."[1] There are many homicide cases concerning defense of another but surprisingly few cases on criminal liability for assault by one who intervenes in defending another from apparent attack. Many jurisdictions hold that the defender steps into the shoes of the person he is defending and acts at his own peril. Thus

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15See, *e.g.*, Shuttlesworth v. Board of Education, 358 U.S. 101 (1958).

16O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 258 (1930).

17Williams v. Baltimore, 289 U. S. 36, 42 (1933).

18Miss. Code Ann. §§ 6282-41 to -43 (Supp. 1960).

1Perkins, Criminal Law 912 (1957).

a father cannot defend his child if the child could not defend himself in the same way,[2] nor can a brother intervene in defense of his brother whose own actions precluded the right of self-defense.[3] A person can defend his social friend,[4] close associate,[5] or a stranger,[6] but only if that person has the right to defend himself. However, it should be noted that many decisions under the above rule were decided in circumstances where the defendant was present during the entire affray and not where the defendant happened upon the scene.[7]

There are a growing number of decisions holding that one is justified in defending another when he reasonably believes the other is being unlawfully assaulted. Under this rule one may defend any member of his family,[8] a friend,[9] or any other person[10] where the defender reasonably apprehends the commission of a felony or serious bodily injury upon the defended person. The defender is not deprived of what he thinks is the defended person's right of self-defense,[11] and he is judged by his own intent and not the intent of the person to whose aid he goes.[12] In the present case, the court ruled that mistake of fact concerning the identity of the assailants and necessity for intervention negatived the criminal intent required for assault; the defendant's intentions were commendable.

The decision is correct for additional reasons. Since a person can be absolved of homicide under existing statutes in a great number of states when, with reasonable care, he intervenes in defense of another,[13] he also should be absolved of the lesser offense of assault and battery committed in defense of another person. The state's interest in the protection of its citizens from crime necessitates that one be allowed to defend another and escape liability for his actions when the defender acts as a reasonable man would do under the same circumstances. Bystanders might refuse to aid one suffering unlawful attack if they realized that a reasonable mistake of fact would subject them to criminal liability. The *Restatement of Torts* indicates that a defendant is not liable when he has acted as a reasonable man should,[14] and this same rule is being extended to the area of criminal law.[15] The jury would keep the rule within reasonable bounds, for it determines whether the defendant acted as a reasonable man under the circumstances.

James Kearney Travis, Jr.

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[2]*E.g.*, Robinson v. City of Decatur, 32 Ala. 654, 29 So. 2d 429 (1947).

[3]*E.g.*, Commonwealth v. Hounchell, 280 Ky. 217, 132 S.W.2d 217 (1939).

[4]State v. Ronnie, 41 N.J. Super. 339, 125 A.2d 163 (Essex County Ct. L. 1956).

[5]*E.g.*, Guerriero v. State, 213 Md. 545, 132 A.2d 466 (1957).

[6]See, *e.g.*, McBroom v. State, 26 Okla. Crim. 352, 224 Pac. 210 (1924).

[7]See, *e.g.*, People v. Young, 210 N.Y.S.2d 358 (App. Div. 1961).

[8]*E.g.*, Brannin v. State, 221 Ind. 123, 46 N.E.2d 599 (1943).

[9]See, *e.g.*, Reeves v. State, 153 Tex. Crim. 32, 217 S.W.2d 19 (1949).

[10]See, *e.g.*, Missouri v. Totman, 80 Mo. App. 125 (1899).

[11]*E.g.*, Kees v. State, 44 Tex. Crim. 543, 72 S.W. 855 (1903).

[12]*E.g.*, Guffee v. State, 8 Tex. Crim. 187 (1880).

[13]*E.g.*, MISS. CODE ANN. § 2218 (f) (1956)..

[14]RESTATEMENT, TORTS § 76 (1934).

[15]MODEL PENAL CODE § 3.05, 3.09 (Tent. Draft No. 8, 1958).

EQUITY & JUDGMENTS — *In Pari Delicto* AND PUBLIC POLICY — RES JUDICATA

Defendant Bologna was a liquor dealer in Louisiana and a creditor of a liquor dealer in Vicksburg who bought from Bologna. Defendant held promissory notes from debtor in the amount of $100,000.00, secured by deeds of trust executed by debtor and his wife. The wife brought an action against the trustee seeking to enjoin the foreclosure of the deeds of trust and to have them set aside as void because the underlying indebtedness arose from the illegal sale of liquor. On the ground that she was *in pari delicto* with the parties to the illegal contract, the chancery court refused all relief. She then transferred the property to her sister-in-law, who brought his action against Bologna, purchaser at the trustee's sale, and the trustee to cancel the trustee's deeds and set aside the deeds of trust. Decree for defendant. HELD: Reversed. The essentials for the application of the doctrine of res judicata did not exist in this case because of the lack of identity of parties in the two cases and the lack of identity in the thing sued. for. Even though the complainant is in privity with a party who is *in pari delicto,* a court of equity may interefere from motives of public policy and give affirmative relief by setting aside the conveyances. *Morrissey v. Bologna,* 123 So. 2d 537 (Miss. 1960).

In Mississippi certain elements are essential for the operation of the doctrine of res judicata. These are (1) identity in the thing sued for; (2) identity in the cause of action; (3) identity of persons and parties to the actions; and (4) identity of quality in persons for or against whom claim is made.[1] The requirement of identity in the thing sued for has been construed liberally. Neither the form nor the measure of relief need be the same in both cases in order for the doctrine of res judicata to apply.[2] Recovery in a suit for balance due on a contract has been held to preclude a second action for damages.[3] Similarly, a second action for damages has been disallowed after recovery in a suit for double rent.[4] The generally applied test of identity of cause of action is a consideration of the identity of the facts necessary to maintain the actions,[5] or whether the same evidence would support both.[6] Apparently this test is applied in Mississippi.[7] Identity of parties includes those in privity with the parties.[8] For the purposes of res judicata, a purchaser who acquires property after litigation involving the vendor is in privity with the vendor,[9] and a trustee is in privity with the cestui que trust.[10] The identity of quality

[1] *E.g.,* Campbell v. Campbell, 231 Miss. 658, 97 So. 2d 527 (1957).

[2] *E.g.,* St. John v. Wisconsin Employment Relations Bd., 90 F. Supp. 347 (E. D. Wis. 1950), *vacated on other grounds,* 340 U.S. 411 (1951).

[3] Home Ins. Co. v. Tate Merchantile Co., 117 Miss. 760, 78 So. 709 (1918) (judgment for $508.47 precluded second judgment for $10,000.00 damages).

[4] Tepper Bros. v. Buttross, 178 Miss. 569, 174 So. 556 (1937) (judgment for $600.00 precluded second action for $7500.00 damages).

[5] See, *e.g.,* Bittner v. West Virginia-Pittsburg Coal Co., 15 F.2d 652 (4th Cir. 1926).

[6] See, *e.g.,* Kelliher v. Stone & Webster, 75 F.2d 331 (5th Cir. 1935).

[7] See Pan American Petroleum Corp. v. Gully, 179 Miss. 847, 175 So. 185 (1937).

[8] See, *e.g.,* Moses v. Weaver, 210 Miss. 228, 49 So. 2d 235 (1950).

[9] *E.g.,* Hayes v. First Joint Stock Land Bank, 174 Miss. 880, 165 So. 605 (1936).

[10] *E.g.,* Manly v. Kidd, 33 Miss. 141 (1857).

in persons refers to a party who is an official representative also participating in another capacity.[11]

Because of the equitable maxim "he who comes into equity must come with clean hands," a court of equity ordinarily will not give relief when parties are *in pari delicto*.[12] In such an instance the defendant's position is stronger.[13] There is an exception to the rule, however, and a court of equity will act even though the parties are *in pari delicto* if public policy would be advanced.[14] A party in privity with a party *in pari delicto* succeeds to the rights of his predecessor but to no greater rights.[15] In the instant case the court held that policy would be advanced by setting aside the deeds of trusts and the trustee's deeds. In Mississippi the public policy against the enforcement of illegal contract is incorporated into the code in specific reference to liquor debts.[16] Liens for such debts are expressly declared void, and the creditor is disabled from recovering his debt. The effect of this statute, as declared by the court, is to bar all persons from collecting in the courts of the state any debt contracted for intoxicating liquors.[17] This is a mere codification of the common law.[18] This public policy does not prevent property rights from arising from an illegal contract; it denies the creditor in liquor transactions the processes of the courts in collecting the debt.[19]

The court did not apply the doctrine of res judicata because of the lack of identity of parties and of the thing sued for. Quoting American Jurisprudence, the court said, "The general rule is that a judgment rendered because of a defect of parties does not operate to bar a subsequent action."[20] This statement, however, seems inapplicable[21] to the instant case in which both decrees were rendered on the merits, neither being based upon defect of parties, misjoinder, etc. The complainant, a purchaser whose interest in the property was acquired after the litigation, was in privity with the vendor for the purpose of res judicata in Mississippi.[22] So was Bologna in privity with the trustee;[23] thus the requirement of identity of parties was satisfied. The requirement of identity in the thing sued for has been held to be fulfilled when the only

[11]See, *e.g.*, Washburn v. Phillips, 14 Miss. (6 S. & M.) 425 (1846).

[12]*E.g.*, Woodson v. Hopkins, 85 Miss. 171, 37 So. 1000 (1904).

[13]See, *e.g.*, *ibid.*

[14]*E.g.*, Rideout v. Mars, 99 Miss 199, 54 So. 801 (1911).

[15]*E.g.*, Rust v. Gillespie, 90 Okla. 59, 216 Pac. 480 (1923); see also, Walton v. Tusten, 49 Miss. 569 (1873).

[16]MISS. CODE ANN. § 2612 (1956).

[17]Goodman v. Swett, 108 Miss. 224, 66 So. 535 (1914).

[18]*Ibid.*

[19]See, *e.g.*, Lowenburg v. Klein, 125 Miss. 284, 87 So. 653 (1921).

[20]Morrissey v. Bologna, 123 So. 2d 537, 542 (Miss. 1960).

[21]See, *e.g.*, St. Romes v. Levee Steam Cotton Press Co., 127 U. S. 614 (1888); see also, House v. Mellen, 89 U. S. (22 Wall.) 42 (1874).

[22]See, *e.g.*, Hayes v. First Joint Stock Land Bank, 174 Miss. 880, 165 So. 605 (1936); see also, Gilliam v. McLemore, 141 Miss. 253, 106 So. 99 (1925).

[23]See, *e.g.*, Manly v. Kidd, 33 Miss. 141 (1857); see also, Loeb v. Chicago, St. Louis & New Orleans R.R., 60 Miss. 933 (1883).

similarity in the thing sued for was that each action was for money.[24] The amounts were different as were the bases of liability; nonetheless the requisite identity was found to exist, indicating that this requirement is to be applied in an extremely general manner. In the instant case, admittedly, the form of relief differed. It was not, however, "different" for the purposes of res judicata. The same end result was sought; only a change in circumstances (intervening trustee's sale) necessitated a different form of relief. It is submitted that the court failed to properly analyze these requirements as they have been developed in the jurisprudence of Mississippi and the nation. It is further submitted that the court erred in determining the public policy of Mississippi in regard to the enforcement of illegal contracts and the validity of property rights arising from such contracts. As pointed out by the dissenting opinion, valid rights may result from an illegal contract.[25] The public policy does not require invalidation of such rights. Indeed, the public policy cries out against the courts entering into such a dispute — the tainted parties should be left alone.[26] The effect of the result reached by the court is to restore the consideration to the debtor in the illegal contract. If the reasoning of the court is carried to its logical conclusion in the future, strange new principles of law will be added to the jurisprudence of this state.

John Robin Bradley, Jr.

Evidence — Rape — Admissibility of Accusatory Statement Made by Prosecutrix

Appellant was convicted of rape of an eleven year-old child. The lower court overruled an objection to testimony of a witness as to an accusatory statement made by prosecutrix shortly after the alleged rape was committed. Held: Affirmed. It was not error to allow evidence of the accusatory statement of the prosecutrix in a prosecution for rape, *Boyd v. State*, 123 So. 2d 857 (Miss. 1960).

Historically, evidence of the *fact* of fresh complaint made by prosecutrix, but not the details of her statement, has been admitted by the courts with little or no attempt at explanation, prior to 1800, of the principle on which such fact of complaint was admitted. In the early nineteenth century, when increased attention was focused on rules of evidence, courts began to search for principles with which to justify the previously unquestioned admission of such evidence.[1] Development of several theories of admissibility followed. It has been said that evidential use of fresh complaint came to us from the early English law applicable in all charges of violence, requiring the accuser to show that he made "hue-and-cry, alarming the neighborhood, freshly after the oc-

[24]See, *e.g.*, Tepper Bros. v. Buttross, 178 Miss. 569, 174 So. 556 (1937).

[25]Morrissey v. Bologna, 123 So. 2d 537, 546 (Miss. 1960); see also, Lowenburg v. Klein, 125 Miss. 284, 87 So. 653 (1921).

[26]See, *e.g.*, Goodman v. Swett, 108 Miss. 224, 66 So. 535 (1914).

[1]IV Wigmore, Evidence § 1136 (3d ed. 1940).

curence."[2] In some cases admissibility has been based on the theory that the complaint constitutes a part of the *res gestae*,[3] if the circumstances of the making of the complaint or statement satisfies the limitations of that doctrine as to spontaneity and its proximate connection with the occurrence. As part of the *res gestae* the complaint becomes original evidence and is generally not admitted as corroborative but as a verbal act directly connected with the alleged attack.[4] Thus, something more than the bare statement that a complaint was made is usually admitted into evidence.[5] The strict requirement concerning the proximity of the act and the complaint has relegated this theory to infrequent use. Other courts have admitted the complaint of prosecutrix to overcome an inference that she consented to the act unless a complaint is shown. An outrage of this nature upon a virtuous female is so great that a natural presumption follows that she will, at the first opportunity, make disclosure of the attack, and if she does not make such disclosure, an inference arises that no violence took place and she will be to that extent discredited.[6] Evidence of complaint is logically inadmissible under this theory where the prosecutrix is between the ages of twelve and eighteen when, by statute, her consent is immaterial on the theory that she is without legal capacity to give that consent.[7] Should not a female under twelve years of age be as incapable of giving consent as is one over twelve and under eighteen? In some courts a complaint obtained by means of questions propounded to the prosecutrix is inadmissible, but in others admissibility depends on the relations between the female and the person doing the questioning, the character of the questions, and the circumstances under which they are asked.[8] Under this theory, the details of the complaint are generally excluded as being violative of the hearsay rule,[9] for there is no necessity to bring in more than the mere fact of the complaint if the purpose is solely to rebut the inference of consent arising from a failure to make complaint. Still another theory under which evidence of complaint has been admitted is in corroboration of witness' testimony or rehabilitation after the witness has been impeached.[10] Under this principle, details of the complaint are properly admissible to test or verify the recollection of the prosecutrix, but not as evidence of the truth of their content.[11]

Though decisions appear to be in confusion as to the basis of admissibility, the rule seems well established that the mere fact of the victim's complaint, if made within a reasonable time after occurrence, may be admitted into evidence, whether by testimony of the prosecutrix or by the person to whom the statement was made. Where the complaint

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[2]VI *id.* § 1760.

[3]See Simmons v. State, 105 Miss. 48, 61 So. 826 (1913).

[4]See *ibid.*

[5]*E.g.*, Brown v. State, 72 Miss. 997, 17 So. 278 (1895).

[6]Redding v. State, 211 Miss. 855, 53 So. 2d 7 (1951).

[7]Lewis v. State, 183 Miss. 192, 184 So. 53 (1938).

[8]See *ibid.*

[9]*E.g.*, Powell v. State, 195 Miss. 182, 13 So. 2d 622 (1943).

[10]IV WIGMORE, *op. cit. supra* note 3, § 1137.

[11]*Id.* § 1138.

is considered part of the *res gestae* or where the prosecutrix requires corroboration or rehabilitation, not only the fact but the details of the complaint are generally admissible. Just what constitutes "details" is a question on which courts do not agree.[12] Testimony as to physical condition and marks of violence on the person or clothes of prosecutrix has been admitted.[13] In 1912 the Mississippi Court found fatal error in the admission of details as to the locality of the attack,[14] but a later case held evidence of statements of locality as well as time of the occurrence admissible.[15] It is generally held prejudicial error to permit testimony that prosecutrix stated the identity of the person who allegedly raped her.[16]

In the instant case, the action of the court in allowing testimony of an accusatory statement made by the prosecutrix which names the assailant can be reconciled with former decisions only on the expressed theory of "harmless error."[17] The rule expressed in former decisions is obviously founded on a desire to prevent the court from being prejudiced toward the accused. It is likely that by this decision, regardless of the effect of the testimony in the instant case, the door may have been opened, however slightly, toward general admissibility of accusatory statements naming the assailant in prosecutions for rape.

Raymond L. Brown

Exemplary Damages — Evidence of the Wealth of Joint Tort-Feasors

In a libel action the plaintiff joined as defendants two music and pinball machine distributors and a newspaper publishing company. Evidence of the financial worth of the distributors was admitted during the trial to prove punitive damages, and a verdict was rendered for $50,000.00 compensatory damages and for $50,000.00 punitive damages. The defendants appeal. Held: Reversed as to the $50,000.00 punitive damages. Although otherwise assessable, the plaintiff waives his right to punitive damages based upon evidence of the wealth and ability to pay of a defendant when two or more parties are made defendants to the action. *Dunaway v. Troutt,* 339 S.W.2d 613 (Ark. 1960).

"In most jurisdictions evidence of the wealth and financial condition of the defendant is admissable and may be considered by the jury in determining the amount of exemplary damages to be allowed . . . ."[1] Such evidence is admitted because, "The damages which would operate as proper punishment to one man might be inadequate to that effect

12 44 Am. Jur. *Rape* § 84 (1942).

13Brown v. State, 72 Miss. 997, 17 So. 278 (1895).

14Frost v. State, 100 Miss. 796, 57 So. 221 (1912).

15Lauderdale v. State, 227 Miss. 113, 85 So. 2d 822 (1956).

16*E.g.,* Fairley v. State, 225 Miss. 371, 83 So. 2d 278 (1955).

17Boyd v. State, 123 So. 2d 857 (Miss. 1960).

115 Am Jur. *Damages* §346 (1938).

upon another . . . and on the contrary, a verdict that would be scarcely regarded by a wealthy man, might be ruinous to a poor man."[2] The logic becomes less impelling,[3] however, when the plaintiff seeks exemplary damages against joint tort-feasors in a state not allowing the jury to apportion such damages among the defendants.[4] In these jurisdictions the jury must return a single verdict, and the guilty tort-feasors become jointly liable to the judgment creditor for the total amount of the verdict and liable between themselves for a pro rata share.[5]

The Supreme Court of the United States,[6] followed by a majority of jurisdictions,[7] theorizes that just punishment for the wealthier defendant — the object of admitting evidence of wealth[8] — may bring ruin to the co-defendant who is less able to pay his proportionate share of the judgment. These jurisdictions reason that, "It would be a hard rule to call upon the two agents to pay damages estimated upon the wealth of . . . [one],"[9] and will not admit the wealth of a defendant to prove punitive damages against co-defendants. It should be remembered that the plaintiff ". . . having an option to sue one or more of the joint tort-feasors concerned . . . has elected to sue more than one,"[10] and perhaps he should be required to bear the burden of his choice.[11] The Arkansas court chose to follow this line of authority.[12] Other jurisdictions,[13] constituting the minority view, choose to consider the problem from the viewpoint of the plaintiff and admit evidence of joint tort-feasors' ability to pay punitive damages. Their reasoning is that if punitive damages are not awarded, the plaintiff may lose an essential part of his verdict; and, furthermore, exclusion of this evidence could furnish the defendants with a means to circumvent just punishment for their tort as "a wealthy defendant. . .might escape the payment of just and reasonable damages, by having others, without character or property, associated in the unlawful act."[14]

Mississippi provides by statute that joint tort-feasors "shall share equally the obligation imposed by . . . judgment"[15] and thus it becomes necessary to decide the problem of admitting evidence of wealth. A long line of Mississippi cases beginning in 1854[16] uniformly adhere to the

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[2]Bell v. Morrison, 27 Miss. 68 (1854).

[3]Compare Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929), with Washington Gaslight Co. v. Lansden, 117 U.S. 534 (1898).

[4]See generally Annot., 62 A.L.R. 239 (1929).

[5]*E.g.*, Southland Broadcasting Co. v. Baker, 210 Miss. 836, 50 So. 2d 572 (1951). See also Meridian City Lines v. Baker, 206 Miss. 58, 391 So. 2d 541 (1949).

[6]Washington Gaslight Co. v. Lansden, 117 U.S. 534 (1898).

[7]See, *e.g.*, Annot., 63 A.L.R. 1405 (1929).

[8]Bell v. Morrison, 27 Miss. 68 (1854).

[9]Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S.E. 320 (1906).

[10]McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216 (1919).

[11]See, *e.g.*, Washington Gaslight Co. v. Lansden, 117 U.S. 534 (1898).

[12]Dunaway v. Trout, 339 S.W.2d 613 (Ark. 1960).

[13]See, *e.g.*, Annot., 63 A.L.R. 1408 (1929).

[14]Bell v. Morrison, 27 Miss. 68 (1854)

[15]MISS. CODE ANN. § 335.5 (1956).

[16]Bell v. Morrison , 27 Miss. 68 (1954).

minority rule[17] allowing such evidence to be admitted and assess the amount of damages which ". . .the most culpable of them ought to pay."[18] The injured plaintiff therefore is favored over the joint tort-feasor, and justice is thought to be best served by excessively punishing the less affluent wrongdoer[19] when the alternative is to hamper the remedy of an innocent plaintiff.[20]

Neither admitting nor refusing to admit evidence of wealth is the complete answer to the problem since, in either case, one party will be unjustly prejudiced to the gain of the other. Perhaps the solution lies in statutory change since apportionment is generally governed by statute.[21] Allowing juries to apportion between joint tort-feasors according to their culpability and wealth would completely circumvent the problem. California has achieved this desirable solution reasoning that since the purpose of punitive damages is to punish the defendant for his wrong, ". . . juries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense."[22] Separate awards for exemplary damages against joint tort-feasors would punish the wrongdoers according to their culpability and ability to pay and justly recompense the plaintiff.

Ben H. Stone

INCOME TAXATION — ORDINARY INCOME AND LOSS OR CAPITAL GAIN AND LOSS — COMMODITY FUTURES TRANSACTIONS

The taxpayer was in the business of buying and selling livestock. Fearing a severe decline in business he entered the commodity futures market as a means of insuring against possible losses in his livestock business. Losses resulting from the transactions in commodity futures were reported as ordinary losses. Commissioner asserted a tax deficiency, claiming them to be capital losses. In an action for refund the jury reached a verdict for the taxpayer. HELD: Reversed and remanded. The taxpayer's dealings in commodities were purely speculative and fell into the class of legitimate capital investments. *United States v. Rodgers,* 286 F.2d 277 (6th Cir. 1961).

The Internal Revenue Code[1] provides that the term "capital asset" includes all property held by the taxpayer except certain exclusions such as stock in trade or property includible in inventory or property held primarily for sale to customers in the ordinary course of trade or business. It is difficult to classify transactions in commodity futures for they often have all the earmarks of property used in the ordinary course

[17]*E.g.,* Tipps Tool Co. v. Holifield, 218 Miss. 670, 67 So. 2d 609 (1953). See generally Annot., 63 A.L.R. 1408 (1929).

[18]Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950).

[19]See, *e.g.,* Washington Gaslight Co. v. Lansden, 117 U. S. 534 (1898).

[20]See, *e.g.,* Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929).

[21]See generally Annot., 62 A.L.R. 239 (1929).

[22]Thompson v. Catalina, 205 Cal. 402, 27 P. 190 (1928).

[1]INT. REV. CODE OF 1954, § 1221.

of business, while they appear, from a literal reading of the code, to come within the definition of a capital asset. In 1924, the Supreme Court[2] classified persons dealing in the commodity futures market into three groups: (1) those who use them to hedge; (2) legitimate capitalists; and (3) gamblers or irresponsible speculators. The basic principle of hedging is the maintenance of an even or balanced market position; it is resorted to by businessmen to avoid the risk of changes in the market price of an actual commodity.[3] In 1936, the Treasury Department[4] defined a hedge, stating that it was regarded as a form of insurance necessary to conservative business operation, and provided that gains and losses occurring from such transactions should be treated as ordinary income and loss. For approximately twenty years, the courts generally adhered to this definition in determining the tax consequences of gains and losses arising from these transactions. If a hedge was found, ordinary income and loss treatment was allowed;[5] if not, capital gain and loss treatment was accorded.[6] In 1955, in the leading case[7] in this field, the Supreme Court held that gains realized by a manufacturer of corn by-products from dealings in corn futures constituted ordinary income. The Court found no evidence of a genuine hedge, but said there was evidence of a partial hedge in the form of partial insurance against increases in the price of corn and against an inadequate supply of corn, and held that such transactions in corn futures were an integral part of the taxpayer's business. More important, the Court stated that when property is held incident to the taxpayer's regular business, rather than as an investment, the definition of a capital asset must be narrowly construed, and the exception clauses broadly construed.[8] Unfortunately, the Court provided no workable standards whereby a distinction could be made between investment income and business income. This probably accounts for the marked reluctance of the lower courts in later decisions[9] to depart substantially from the use of the hedge test. In the principal case the taxpayer offered testimony to show that he entered the commodity futures market to protect his livestock business from anticipated losses, only after he had ascertained from an investigation that the cost of insurance against such losses was prohibitive. The court, apparently relying on the hedge text, found no direct or balancing relationship between the futures transactions and the livestock business sufficient to support the conclusion that the futures transactions constituted

[2]United States v. New York Coffee & Sugar Exchange, 263 U.S. 611, 619 (1924).

[3]See generally Commissioner v. Farmers & Ginners Cotton Oil Co., 120 F.2d 772, 774 (5th Cir.), *cert. denied*, 314 U. S. 683 (1941).

[4]G.C.M. 17322, XV-2 CUM. BULL. 151 (1936).

[5]See, *e.g.*, Ben Grote, 41 B.T.A. 247 (1940).

[6]See, *e.g.*, Estate of Dorothy Makransky, 5 T.C. 397 (1945), *aff'd per curiam*, 154 F.2d 59 (3d Cir. 1946).

[7]Corn Products Refining Co. v. Commissioner, 350 U. S. 46 (1955).

[8]Note, 65 YALE L.J. 401, 406 (1956).

[9]See, *e.g.*, Staple Gin Company v. United States, 164 F. Supp. 919 (S.D. Tex. 1958). *But see*, Mansfield Journal Co. v. Commissioner, 274 F.2d 284 (6th Cir. 1960). See also Farroll v. Jarecki, 231 F.2d 281 (7th Cir.), *cert. denied*, 352 U. S. 830 (1956). Compare United States v. Bondurant, 245 F.2d 265 (6th Cir. 1957).

an integral part of the taxpayer's business. The dissent[10] was of the opinion that the taxpayer need only have entered the futures market for the sole purpose of affording himself protection against losses in his business, and that such transaction did accord reasonable protection, in whole or in part, and for that reason had such direct relation with the hazards of the livestock business as to constitute an integral part of his business.

The principal case indicates a need for a definitive test in determining whether a taxpayer's dealings in commodity futures constitute an integral part of his business or whether these transactions arise from investment or speculative purposes. Possibly a statutory exclusion from capital asset treatment would clear up much of the uncertainty in this field. Obviously, the denial or ordinary loss treatment in the principal case distorts the taxpayer's income picture. It is submitted that this can be prevented in many instances by placing greater emphasis on the kind of taxpayer engaging in the futures market and the purposes for which he deals with the property, rather than on the nature of the property itself and the hedge test with its inevitable technical considerations. This viewpoint appears to be that adopted by the dissent[11] and, moreover, it seems to be in closer accord with the investment approach of the Supreme Court.[21]

Justin L. Cox

Oil and Gas — Adverse Possession of Minerals under Mississippi Statute of Limitations

Suit in equity to cancel mineral deed on grounds of fraud. In 1940 appellant, almost illiterate, executed a deed to appellee to an undivided one-half interest in the oil, gas, and other minerals located under 160 acres owned by appellant. The deed, filed for record in 1940 and duly recorded, was not challenged until 1958 when appellant filed suit alleging that appellee's agents had fraudulently represented the deed to be a mineral lease and that in reliance thereon appellant signed the instrument. The lower court sustained appellee's demurrer on the grounds that the statute of limitations[1] barred the suit. Held: Affirmed. Defendant in equity suit to cancel mineral deed on grounds of fraud may interpose as defense the statute of limitations when such deed has been of record for the statutory period. *Neal v. Teat,* 126 So. 2d 124 (Miss. 1961).

The decision of the principal case raises an important question in the field of oil and gas law, viz., what constitutes adverse possession of sub-surface minerals? As to minerals which have not been severed from the surface by conveyance, the general proposition is that adverse possession of the surface without drilling for the statutory period will ma-

[10]United States v. Rodgers, 286 F.2d 277, 282 (6th Cir. 1961).

[11]*Ibid.*

[12]Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1955).

[1]Miss. Code Ann. §§ 709-10 (1956).

ture title to both surface and minerals.[2] Similarly where there has been no severance up to the time of adverse entry, neither severance of the minerals by reservation and conveyance of the surface to another, nor conveyance of the mineral estate and reservation of the surface by the adverse possessor after entry but before expiration of the limitation period will toll the running of the statute as to the adverse possessor's claim to the minerals.[3] Also, severance of minerals by the lawful owner after another's adverse entry but before the statutory period has expired is usually held not to interrupt the running of the statute on the lawful owner's right to either surface or minerals.[4] However, it is a well established rule that where minerals have been severed before adverse entry, possession of the surface is not adverse to the several mineral estate.[5] Where minerals have been severed from the surface, adverse possession can be achieved only by ". . .actually taking possession of the minerals by drilling wells or digging mines and capturing or taking possession of the minerals. . .for the statutory period of adverse possession."[6]

The precise question before the court in the principal case was whether it is possible under the Mississippi statute of limitations to mature a limitation title to minerals, adverse to title of the real owner, by a fraudulently obtained, and therefore voidable, recorded deed. In a line of cases beginning in 1883[7] the Mississippi Supreme Court has consistently held that as to whole estates in land, the statute of limitations may be invoked defensively only by a defendant in actual adverse possession of the land.[8] As the court stated in one of these cases[9] "It would be meaningless to talk about suits to 'recover the land' . . . if the contemplation of the statute were not that possession of the land is an essential feature in the very nature of things."[10] This rule has been applied in a suit to cancel a forged mineral deed,[11] where it was held that as a void deed is an absolute nullity and conveys no title, no possession, actual or constructive, is achieved by the recording of the void deed. That one cannot adversely possess minerals by maturing a limitation title under a void deed is a generally accepted rule.[12] However, although a totally void deed passes no title, a voidable deed operates as a valid instrument

[2]See, *e.g.*, Rio Bravo Oil v. Staley Oil Co., 138 Tex. 198, 158 S.W.2d 293 (1942).

[3]*E.g.*, Carlisle v. Federal Land Bank of New Orleans, 217 Miss. 289, 64 So. 2d 142 (1953).

[4]*E.g.*, Broughton v. Humble Oil & Refining Co., 105 S.W.2d 480 (Tex. Civ. App. 1937).

[5]*E.g.*, Levy v. Campbell, 200 Miss. 721, 28 So. 2d 224 (1946).

[6]White v. Merchants & Planters Bank, 229 Miss. 35, 49, 90 So. 2d 11, 15 (1956).

[7]Dingey v. Paxton, 60 Miss. 1038 (1883).

[8]*E.g.*, Leech v. Masonite Corp., 219 Miss. 176, 68 So. 2d 297 (1953); E. L. Bruce Co. v. Smallwood, 188 Miss. 771, 196 So. 227 (1940); Newman v. J. J. White Lumber Co., 162 Miss. 518, 139 So. 838 (1933).

[9]Kennedy v. Sanders, 90 Miss. 524, 43 So. 913 (1907).

[10]*Id.*, at 542, 43 So. at 916.

[11]Continental Oil Co. v. Walker, 238 Miss. 21, 117 So. 2d 333 (1960).

[12]See, *e.g.*, Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (1941); *Cf.* Prather v. Prather, 208 Miss. 59, 43 So. 2d 582 (1949).

to convey title until set aside by the court.[13] Upon this principle a line of recent Mississippi cases has held that a fraudulently obtained, and thus voidable mineral deed on record for the statutory period will mature a limitation title to the minerals without actual adverse possession.[14] This rule has found general acceptance in other jurisdictions.[15] Such construction of the Mississippi statute of limitations apparently conflicts with the line of decisions holding that the statute may be invoked only by a defendant in actual adverse possession. However, the two lines of cases are reconcilable upon the theory that the grantee under a voidable mineral deed takes title and constructive possession, subject to cancellation by the real owner within the statutory period.

The rule announced by the principal case sets forth a notable exception to the general proposition that the Mississippi statute of limitations may be invoked only by a defendant in actual adverse possession of a severed mineral estate. From a practical standpoint such an interpretation of the statute is essential, for otherwise exploration and development of productive areas within the state would be unreasonably restricted by a flood of litigation attempting to set aside allegedly fraudulent mineral conveyances.

William Timothy Jones

Property Mortgaged for Future Advances — Effect of a Declaration of Homestead before Advancement

A bachelor executed a mortgage on his home to his mother as security for his promissory note for $10,000 given in consideration for her promise to make future advances up to that amount. Before any money was advanced the bachelor married the defendant and the couple established the property as their homestead. Shortly thereafter he requested the $10,000 of his mother and she paid it over to him, aware that the property had now acquired homestead status. A few months later the mortgagor died and his mother brought this action to foreclose. His widow contends there was no lien on the property until the $10,000 was paid, which was after the establishment of the homestead. Held: Judgment for the mortgagee affirmed. When the obligation to pay over the $10,000 was performed, consideration related back to the time the mortgage was recorded and became a valid lien against the property as of that date even though a homestead status subsequently attached. *Simpson v. Simpson,* 123 So. 2d 289 (Fla. 1960).

In almost all American jurisdictions a mortgagee who is legally obligated to make future advancements enjoys priority over later liens from the date of recordation, regardless of notice[1] and even though the agree-

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[13] 16 Am. Jur. *Deeds* § 31 (1938).

[14] *E.g.,* Gandy v. Burke, 236 Miss. 241, 109 So. 2d 926 (1959); Aultman v. Kelly, 236 Miss. 1, 109 So. 2d 344 (1959); King v. Childress, 232 Miss. 766, 100 So. 2d 578 (1958).

[15] See, *e.g.,* Dunn v. County of Los Angeles, 318 P.2d 795 (Cal. App. 1957).

[1] *E.g.,* Whelan v. Exchange Trust Co., 214 Mass. 121, 100 N.E. 1095 (1913).

ment to make the advances is oral.[2] Even in the case of optional advances most courts accord priority to the mortgagee over subsequent encumbrances for all advances made up to the time when the mortagee had actual notice of the later encumbrance,[3] although he is unprotected for advances made thereafter.[4]

The unusual circumstance of an intervening homestead claim arising after recordation of a mortgage for legally obligatory future advances, but before any advancements were made thereunder, presents a question of first impression.[5] The Florida court had little difficulty, however, in finding a close analogy between these facts and earlier precedents in which homestead rights were subordinated to prior claims of a levying creditor[6] and a statutory lienor,[7] and held that there is no difference in principle between a mortgage for future advances and a statutory lien or a judgment levy. "One is as binding as another."[8] But for the novelty of the question injected by a *homestead* claim, and the complication of an unlikely sequence of events, this case is not of more than usual interest to most. A Florida statute provides that any mortgage for future advances shall be valid as to third persons from the time it is filed for record, and that such mortgages shall be prior in dignity to all subsequent "encumbrances."[9]

In Mississippi, however, this decision brings to mind the unsettled condition of our law on questions involving mortgages for future advances. In 1876, the Mississippi court, in *Witczinski v. Everman*,[10] declined to recognize a distinction between obligatory and non-obligatory advances. That decision allowed a mortgagee to continue making optional advances, which ranked as of the date of the recordation of the mortgage, even after full knowledge of an intervening encumbrance. The reasoning there followed the early English view as set forth in a landmark case[11] which stood for a century and a half before it was severely criticized and expressly overruled by Lord Chancellor Campbell in 1861[12]— just 15 years before Mississippi's Mr. Justice Campbell adopted its rule as our own. *Witczinski*, frequently quoted in connection with the present subject,[13] and now labeled "a leading American exponent

[2]*E.g.*, Lumber & Builders Supply Co. v. Ritz, 134 Cal. App. 607, 25 P.2d 1002 (1933).

[3]*E.g.*, Ackerman v. Hunsiker, 85 N.Y. 46, 36 Am. Rep. 621 (1881); OSBORNE, MORTGAGES § 118 (1951).

[4]*E.g.*, Boswell v. Godwin, 31 Conn. 74, 81 Am. Dec. 169 (1862).

[5]Simpson v. Simpson, 123 So. 2d 289, 294 (Fla. 1960).

[6]Pasco v. Harley, 73 Fla. 819, 75 So. 30, 31 (1917).

[7]First National Bank of Chipley v. Peel, 107 Fla. 413, 145 So. 177 (1932).

[8]Simpson v. Simpson, 123 So. 2d 289, 294 (Fla. 1960).

[9]FLA. STAT. § 697.04 (1959).

[10]51 Miss. 841 (1876).

[11]Gordon v. Graham, 7 Vin. Abr. 52, pl 3, 2 Eq. Cas. Abr. 598, 22 Eng. Rep. 502 (1714).

[12]Hopkinson v. Role, 9 H.L.Cas. 514, JUR. (N.S.) 1209, 34 L.J. CH. 468, 5 L.T.R. 90, 9 W.R. 900, 11 Eng. Rep. 829 (1861).

[13]*E.g.*, 1 JONES, MORTGAGES § 457 at 593, note 92 (8th ed. 928); Annot. 138 A.L.R. 566, 577 (1942).

on the minority view,"[14] has itself been severely criticized for the result it accomplishes.[15] Unquestionably, it hampers marketability, and equally so, additional mortgage financing.[16] Curiously, in 1950 the Mississippi court joined the majority, deciding the issue in a case with almost identical facts in favor of the subsequent encumbrancer.[17] Although *Witczinski* was argued to the court, the majority opinion noticed it only to say that "from the report of the case" it was "uncertain"[18] whether a different rule was there announced. Mr. Justice Alexander dissented, pointing out that *Witczinski* should be followed or fortrightly overruled.[19] Obviously, Mississippi can no longer be pointed to as the "leading exponent" of the minority view, for *Witczinski*, if not now impliedly overruled, has at least been discredited as reliable authority.

John H. Whitworth, Jr.

Tax — Payments under B.A.W.I. Lease Deductible as Rent

In 1952 taxpayer signed a lease with Marshall County, Mississippi, under the Mississippi Balance Agriculture With Industry program[1] for a primary term of 20 years with options for three additional twenty-year periods and one additional nineteen-year period. Lessor county acquired land and constructed a building on the property in accordance with the taxpayer's plans and specifications. In 1955 another lease was signed for an enlargement of the original building, the primary term being 17 years with renewal options similar to the original lease. In the years 1954-56 the taxpayer deducted as rent the sums which it paid under the lease agreements. Commissioner disallowed the deductions on the ground that taxpayer purchased an equity in the improvements and, therefore, the payments were capital expenditures to be amortized or depreciated over the life of the property. Held: The payments under the terms of the lease were rent to be deducted over the term of the primary lease. *Gem, Inc. v. United States,* —F. supp.— (N.D. Miss. 1961).

The Internal Revenue Code provides for a business deduction of rental payments on property unless the taxpayer is acquiring either title to, or some equity in, the property as a result of the payments.[2] If the taxpayer *is* acquiring title or equity, the sums paid are capital expenditures and no deduction *as rent* is allowed.[3] Traditionally, the Missis-

[14]Jones, *Mortgages Securing Future Advances,* 8 Texas L. Rev. 371, 381 (1929).

[15]*Id.* at 381-82.

[16]See also Osborne, Mortgages § 117a(4) (1951).

[17]North v. J. W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950).

[18]*Id.* at 300, 44 So. 2d at 414.

[19]*Id.* at 303, 44 So. 2d at 415.

[1]Miss. Code Ann., §§ 8936, 8936-01-41 (1956).

[2]Int. Rev. Code of 1954, § 162.

[3]Treas. Reg. § 1.162-11 (1960).

sippi Agriculture and Industrial Board[4] has required the lessee to pay such annual sums as will enable the public agency issuing the bonds to pay the principal and interest as they mature in order to relieve the local taxpayer of that burden.[5] At the end of the primary lease, the rental under the renewal option is considerably less. In the *Gem* case the commissioner relied heavily on this factor of the reduced cost of the renewal payments in relation to the cost of the primary term as proof of payment for an equity in the property.[6] In support of taxpayer's contention that there was no equity acquired by the payments, the rent was shown to be not only reasonable but less than could be provided by private lessors.[7] The Mississippi Supreme Court has said, in holding the act constitutional, that its purpose is to provide employment and that failure to do so would make the lease void.[8] In deference to this mandate, the lease specifically provides for termination of the lease if at any time the industry should fail to operate for one continuous year. In further support of taxpayer's contention, it was shown that the agreement contains no option to purchase,[9] and that the taxpayer cannot sublet or assign the lease without permission from the Agricultural and Industrial Board.

The applicable Treasury Regulation provides that the cost of the lease shall be spread over the number of years the lease has to run, without taking into account any right of renewal *unless* the "facts show with a reasonable certainty" that the lease will be renewed[10]. Against the claim that the great disparity between the rental rates during the primary term (approximately $10,000 annually) and the renewal terms ($150 annually) is enough in itself to show reasonable certainty of renewal,[11] the court found the following facts: (1) Taxpayer is engaged in a highly competitive field with an unpredictable future market; (2) His product has no consumer acceptance by brand name, most of the sales being to one customer who sells under his own brand name; (3) Gem is owned by one man who is the principal driving force and contact man; (4) Gem is handicapped by extremely high freight rates on its finished goods; (5) Gem is able to meet competition because of favorable labor market conditions which might change in the future.

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[4]Jones, *Federal Income Tax Deductions of BAWI Leasehold Payments,* 30 MISS. L.J. 10 (1958).

[5]MISS. CODE ANN., § 8936-61 (Supp. 1960) (as codifying the practice of the Board).

[6]Compare Starr v. Commissioner, 274 F.2d 294 (9th Cir. 1959) holding rental of fixture at cost ($1200 annually) with option to renew at cost of inspection fee ($32annually) to be purchase of equity.

[7]*Cf.* Main & McKinney Bldg. Co. v. Commissioner, 113 F.2d 81 (5th Cir. 1940) *cert. denied,* 311 U.S. 688 (additional rent for first 25 of 99 year lease deductible as aliquot part).

[8]Albritton v. City of Winona, 181 Miss. 75, 97, 178 So. 799, 804, *appeal dismissed,* 303 U.S. 627; see also MISS. CODE ANN., § 8936-05 (1956).

[9]*Cf.* Oestereich v. Commissioner, 226 F.2d 798 (9th Cir. 1955), ($679,000 lease with purchase option of $10 held a sale).

[10]Treas., Reg. *supra* note 2.

[11]*Cf.* Benton v. Commissioner, 197 F.2d 754 (5th Cir. 1952).

From these facts the court concluded that there was no reasonable certainty of renewal.

It is readily apparent that cases of this sort will require an intense examination of the factual situation, on which will depend the presence or absence of equity in the taxpayer. Reduced rental rates on renewal are important in this determination, but this factor *alone* should not be controlling. The taxpayer has made an excellent record of facts in his favor in the present case, and this will be of importance should the case be appealed. By the same token the case will be of doubtful value as a precedent for future B.A.W.I. cases with materially different facts.

Hollaman M. Raney

TORTS — RES IPSA LOQUITUR — THE EXPLODING BOTTLE

A restaurant waitress brought an action against a soft drink bottler for injuries sustained when a bottle she was carrying to a cooler exploded. The declaration alleged specific acts of negligence on the part of the defendant-bottler but on trial plaintiff relied on the doctrine of res ipsa loquitur after offering proof that from the time of the delivery of the bottle by the defendant company to the time of the explosion, no person in the restaurant had been guilty of negligence in handling the bottle. The court sustained the defendant's motion for peremptory instruction after hearing the defendant's evidence. HELD: Reversed. Under the doctrine of res ipsa loquitur the element of "exclusive control" of the instrumentality causing the injury is satisfied upon a showing by the plaintiff that due care had been exercised in the handling of the bottle, and an inference of negligence arises whereby the defendant must go forward with proof sufficient to dispel that inference since the defendant was in a better position to know and have access to the facts causing the explosion. *Johnson v. Coca Cola Bottling Co.*, 125 So. 2d 537 (Miss. 1960).

There are two major theories upon which the courts have allowed recovery to a person injured by an exploding bottle: res ipsa loquitur[1] and implied warranty.[2] Some jurisdictions have been reluctant to extend the implied warranty of fitness of content to the container.[3] The better reasoned view applies the doctrine to the container on the basis of "a warranty of the fitness for the use intended."[4] Privity has also been a stumbling block: a few courts have refused to apply warranty on grounds that there are no warranties between an ultimate purchaser and the manufacturer.[5] It is generally held, however, that privity presents no problem in a case similar to the principal case.[6] Under the

[1]*E.g.*, Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342 (1959).

[2]*E.g.*, Canada Dry Bottling Co. v. Shaw, 118 So. 2d 840 (Fla. 1960).

[3]See, *e.g.*, Anheuser-Busch v. Butler, 180 S.W.2d 996 (Tex. Civ. App. 1944).

[4]Canada Dry Bottling Co. v. Shaw, 118 So. 2d 840 (Fla. 1960).

[5]*E.g.*, Atwell v. Pepsi-Cola Bottling Co., 152 A.2d 196 (D.C. Mun. App. 1959).

[6]*E.g.*, Naumann v. Wehle Brewing Co., 127 Conn. 44, 15 A.2d 181 (1940).

doctrine of res ipsa loquitur an inference that the injury resulted from defendant's negligence is said to arise when the thing causing injury, without the injured person's fault, is under the exclusive control of the defendant, and such injury would not occur in the ordinary course of things if the one having control uses proper care.[7]

Prior to a leading case[8] in the early 1900s, the doctrine was not applied to exploding bottle cases because the instrumentality was not within the exclusive control of the defendant at the time of the injury.[9] A majority of jurisdictions following the recent trend, now applies the doctrine by reasoning that the only "exclusive control" necessary is control at the time of the negligent act,[10] some saying that the absence of control at the time of injury is cured by a showing that the plaintiff exercised due care.[11] The plaintiff need not exclude every possible cause of the explosion, but must have evidence that "it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it."[12] There has been little uniformity in the application of the above rule. Recovery has been barred by failure to show lack of mishandling by third persons,[13] failure to show how the bottle was delivered,[14] failure to call persons as witneses who had access to the the bottle.[15] The time element may also have bearing on the application of the doctrine:[16] the longer the delay between delivery and explosion, the weaker the inference. The degree of care required of the plaintiff in the handling of the bottle seems to be "normal handling."[17] A few courts refuse to apply res ipsa loquitur but draw an inference of negligence from circumstantial evidence such as other instances of exploding bottles in "substantially similar circumstances and reasonable proximity of time,"[18] while others in applying the doctrine state that no inference arises from the explosion of a single bottle."[19]

The problem presented in the noted case has been considered only once before by the Mississippi Supreme Court,[20] when it was held that the doctrine of res ipsa loquitur did not apply. The court in the principal case sought to distinguish the first decision on its facts. Such distinction appears to fail because even if the defendant in the older case

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[7]See generally, Annot., 4 A.L.R.2d 466 (1949).

[8]Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912).

[9]*E.g.*, Stodder v. Coca-Cola Bottling Plants, 142 Me. 139, 48 A.2d 622 (1946).

[10]*E.g.*, Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342 (1959).

[11]*E.g.*, Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (1944).

[12]*Id.* at 439.

[13]Atwell v. Pepsi-Cola Bottling Co., 152 A.2d 196 (D.C. Mun. App. 1959).

[14]See Roper v. Dad's Root Beer, 336 Ill App. 91, 82 N.E.2d 815 (1948).

[15]See Trust v. Arden Farms Co., 50 Cal. 2d 217, 324 P.2d 583 (1958).

[16]See Curley v. Ruppert, 272 App. Div. 441, 71 N.Y.S.2d 578 (1947).

[17]See Weggeman v. Seven-Up Bottling Co., 5 Wis. 2d 503, 93 N.W.2d 467 (1958).

[18]Merchant v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949).

[19]See Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916).

[20]*Id.*

showed that the explosion was caused by a peculiar factual situation for which the defendant was not responsible, such proof under the present view is to be used in rebuttal to an inference of negligence. It does not avoid application of the doctrine. Therefore, it is difficult to understand the co-existence of the two cases, the holdings of which are opposed in result, application of both the essentials of control and permissive inference drawn from the explosion of one bottle. The decision in the principal case recognizes the burden that would be placed on the plaintiff if he is required to prove specific negligence when such facts, if any, are readily accessible to the defendant and the defendant alone.

Lucien C. Gwin, Jr.

WORKMEN'S COMPENSATION — CLAIMS FOR EMPLOYEE INJURIES SUSTAINED DURING RECREATIONAL ACTIVITIES AFTER REGULAR WORKING HOURS AND OFF THE EMPLOYER'S PREMISES

An employee was injured while playing softball on a team which purported to represent the employer. The team's formation and its admission into the league were inititated by the employee. The employer paid the entrance fee into the league and provided the team with uniforms and equipment. The uniforms bore the legend of the employer. Admission, except for charity games, was free. Periodically, the league standings were published in a local newspaper. Details of the management of the team were left to the employees. The team was rewarded by the employer if, and when, it won the league championship. The employee's claim for compensation for injuries sustained during one of the softball games was denied. HELD: Affirmed. The injuries sustained by the employee could not be deemed to have arisen out of and in the course of employment. *Complitano v. Steel & Alloy Tank Co.*, 63 N. J. Super. 444, 164 A.2d 792 (1960) (2-to-1 decision).

Because of an enlightened social policy and the inadequacy of common law remedies for employee injuries, virtually all of the states have adopted compensation acts. Under such acts an injured employee is entitled to a workmen's compensation award if his injury fits within the statutory formula, "arising out of and in the course employment."[1] The difficulty arises when the injury-employment connection is not so obvious. In dealing with this problem, the courts have categorized certain factual situations within the statutory formula while others have been held to fall below the required factual standards.

The most prominent issues in these factual situations seem to be the extent of the employer's financial support and the extent of the employer's benefit.[2] A majority of the courts have adopted the opinion that mere encouragement, even with financial assistance on the part of the employer, is not enough to bring recreational activities within the

[1] 1 LARSON, WORKMEN'S COMPENSATION LAWS § 6.10, at 41 (1952).

[2] *Id.* § 22.24, at 337.

course of employment.[3] Generally, morale[4] and efficiency[5] benefits are not alone enough to bring recreation within the course of employment.[6] However, some courts have awarded compensation for recreational injuries on the theory that such recreation made the employee more efficient at his work.[7] A few courts have decided the issue primarily on the common law basis of the right of the employer to control the employee's activity;[8] others have based their decisions on the amount of benefit the employer derives from the activity,[9] such as advertising[10] or financial[11] benefit. Another test the courts have frequently used is the amount of compulsion, either direct[12] or indirect,[13] the employer has exerted on the employees to participate in the activity. In many instances the recreational activity has become so regular or customary in nature, as to render it an incident of employment.[14] Recreational injuries have also been held compensable where the injury occurs during activity provided to stimulate employees to greater efforts.[15] In short, an award of compensation depends upon the degree of employer organization, supervision, pressure (actual or inferred), and the benefit derived by the employer from the particular activity.[16]

The most common reason proferred for not allowing compensation in such cases is that it would cause employers to withdraw support of similar recreational activities.[17] Many authorities have rejected this contention and have suggested that the employer's support will depend in large measure upon experience as to the frequency of injuries sustained by employees during such recreational activities.[18] The specific problem

[3]See, *e.g.*, Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949). *But see* Ott v. Industrial Comm'n, 83 Ohio App. 13, 82 N.E.2d 137 (1948).

[4]See, *e.g.*, Industrial Comm'n v. Murphy, 102 Colo. 59, 76 P.2d 741 (1938).

[5]See, *e.g.*, Stevens v. Essex Fells Country Club, 36 N.J.L. 656, 57 A.2d 469 (Sup. Ct. 1948).

[6]Clark v. Chrysler Corp., 276 Mich. 24, 267 N.W. 589 (1936).

[7]See, *e.g.*, Pusunski v. Transit Valley Country Club, 283 N.Y. 674, 28 N.E.2d 401 (1940).

[8]See, *e.g.*, Auerbach Co. v. Industrial Comm'n, 13 Utah 347, 195 P.2d 245 (1948). *But see* Cardillo v. Liberty Mut. Ins. Co., 330 U. S. 469 (1946).

[9]See, *e.g.*, Jewell Tea Co. v. Industrial Comm'n, 6 Ill. App. 2d 304, 128 N.E.2d 699 (1955).

[10]See, *e.g.*, Tobias v. Stormco Co., 282 App. Div. 1087, 126 N.Y.S.2d 120 (1953).

[11]See, *e.g.*, Holst v. New York Stock Exch., 252 App. Div. 233, 299 N.Y.Supp. 255 (1937).

[12]See, *e.g.*, Salt Lake City v. Industrial Comm'n, 104 Utah 436, 140 P.2d 644 (1943).

[13]See, *e.g.*, Miller v. Keystone Appliance Inc., 133 Pa. Super. 354, 2 A.2d 508 (1938).

[14]See, *e.g.*, Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 Pac. 372 (1919).

[15]See, *e.g.*, Linderman v. Cownie Furs, 234 Iowa 708, 13 N.W.2d 677 (1944). *But see* Berry v. Colonial Furniture Co., 232 N.C. 303, 60 S.E.2d (1950).

[16]Hydro Line Mfg. Co. v. Industrial Comm'n, 15 Ill. 2d 156, 154 N.E.2d 234 (1958).

[17]See, *e.g.*, Industrial Comm'n v. Murphy, 102 Colo. 59, 76 P.2d 741 (1938).

[18]See, *e.g.*, Wilson v. General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781 (1949) (dissenting opinion).

of this case has never been presented for determination in Mississippi,[19] but in light of the courts' view that "doubtful cases should be resolved in favor of compensation"[20] and with the purpose of the several Workmen's Compensation Acts in mind this writer believes that compensation should be awarded in such cases even when such acts are "fairly construed".[21]

Harry L. Case, Jr.

WORKMEN'S COMPENSATION — INTERPRETATION OF STATUTE

In a hearing before the Workmen's Compensation Commission a brother claimed he was wholly dependent on the deceased because of mental and physical disabilities, even though he had received irregular sums from a third party and had earned a small amount monthly, which together were approximately equal to the support rendered by the deceased. The circuit court affirmed the Commission's finding that the claimant was wholly dependent upon his deceased brother. HELD: Affirmed. The Workmen's Compensation Act must receive a common sense and liberal construction in the light of the legislative purpose. *Ross v. Ross,* 126 So. 2d 512 (Miss. 1961).

Soon after the enactment of the Mississippi Workmen's Compensation Law the supreme court adopted the principle that the law should be liberally construed in favor of the claimant.[1] This interpretation was repeated so often that the court ultimately concluded: "[W]e are expressly required by statute to give a liberal construction to the provisions of the Workmen's Compensation Act. . . ."[2] While it is doubtful if any such express requirement ever existed, decisions have in effect achieved the same result.[3] Even in a case of conflicting testimony, where the Commission's findings were supported by substantial evidence, the court has sought to determine whether or not the beneficial purpose of the act had been accomplished.[4] In the light of this liberal interpretation, the addition of a 1960 amendment[5] to the Workmen's Compensation Law has been a matter of considerable interest. The full import of the amendment and the questions raised by it can be realized only by factual inquiry into its history,[6] and the most obvious extrinsic aid to interpretation is the action of the legislature on the proposed amendment.[7] The proposed house bill originally read: "[T]his act shall not be liberally construed in favor of the claimant or workman, but shall be fairly cons-

[19]Compare Pearson v. Stokes, 222 Miss. 479, 76 So. 2d 517 (1954).

[20]See, *e.g.,* Central Elec. Power Ass'n v. Hicks, 236 Miss. 378, 110 So. 2d 351 (1959).

[21]MISS. CODE ANN. § 6998-01 (Supp. 1960).

[1]Central Electric Power Ass'n v. Hicks, 236 Miss 378, 110 So. 2d 351 (1959).

[2]Havens v. Natchez Times Pub. Co., 238 Miss. 121, 117 So. 2d 706 (1960).

[3]See, *e.g.,* Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So. 2d 634 (1951).

[4]See Russell v. Sohio So. Pipe Lines, 236 Miss. 722, 112 So. 2d 357 (1959).

[5]MISS. CODE ANN. § 6998-01 (Supp. 1960).

[6]See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4506 (3rd ed. 1943).

[7]United States v. St. Paul, M. & M. Ry., 247 U. S. 310, 318 (1918).

trued according to the facts. . . ."[8] The obvious aim of the proponents of this proposed bill was to take the liberal construction out of the Workmen's Compensation Law, but the bill as such was rejected by the Mississippi Legislature and the amendment appears in the law thus stated: "[T]his act shall be fairly construed according to the law and the evidence."[9] It is likely that employers' attorneys will contend that the amendment was passed with the intention of abolishing the liberal interpretation of the statute. On the other hand, rejection of an amendment generally indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment;[10] and claimants' attorneys probably will argue that the legislature's rejection of the original form of the bill expressed its desire to continue with the principle of liberal construction in favor of the claimant. Claimants' attorneys may also argue that a liberal interpretation is likewise a fair interpretation.

A recent decision of the Mississippi Supreme Court stated that the passage of the 1960 amendment required a fair interpretation of provisions of the Workmen's Compensation Act rather than the liberal interpretation which the court had theretofore given the act.[11] It was held in this case that the amendment dealt with substantive rather than with adjective rights of employees, and was not to be retroactive as to injuries sustained prior thereto. Employing this construction the amendment was held inapplicable to the case decided since the cause of action originated before the passage of the bill. In the present case the cause of action also arose prior to the amendment, but the opinion, handed down only two months after the previous decision, made no mention of the earlier case or the amendment. The basis for this opinion apparently was the established principle of liberal interpretation in favor of the claimant. The court went so far as to say: "The 'almost universal rule' rejects the hyper-restrictive interpretation suggested by the appellee."[12] Although a strong dissenting opinion was given in the case, it made no reference to a deviation from the principle of liberal interpretation.

It is evident that opinions regarding interpretations of the amended statute would be mere speculation prior to a pronouncement by the court in a cause of action arising subsequent to the passage of the amendment. In one case[13] the supreme court evidently takes the position that a definite change of construction may be expected. However, the noted case, completely ignoring the language of the prior decision, seemingly manifests the rule of liberal interpretation as strongly as ever. The opinion gives no hint of a new interpretation to come, and the question, whether the court will construe this legislative action as requiring a departure from the policy of liberal construction, remains to be answered.

JAMES T. CALDWELL

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[8]Miss. H. R. 69 (1960) (subsequently modified and enacted).

[9]MISS. CODE ANN. § 6998-01 (Supp. 1960).

[10]United States v. Pfitsch, 256 U.S. 547 (1921).

[11]Mississippi Highway Patrol v. Neal, 125 So. 2d 545 (Miss. 1960).

[12]Ross v. Ross, 126 So. 2d 512, 516 (Miss. 1961).

[13]Mississippi Highway Patrol v. Neal, 125 So. 2d 545 (Miss. 1960).

RECENT BOOKS

ADVOCACY AND THE KING'S ENGLISH

Edited by George Rossman, Associate Justice of the Supreme Court of Oregon,
The Bobbs-Merrill Company, Inc. 1960 Pp. 976. $12.50.

The format and the title, "Advocacy and the King's English," of this work are a dual command to halt and examine.

Bound in plastic which simulates Italian marble, embossed in gold with an emblem of the quill surmounting three legal tomes, comprising nearly a thousand pages on thick pulp, the book will be welcome addition to the official decor of many attorneys.

Advocacy is a conservative but distinguished word. With Elizabeth II on the throne, however, "King's English" is somewhat antiquated, especially in view of the fact that "Queen's English" is equally aceptable. More unfortunate is the appeal to Samuel Johnson, a layman, an author certainly not topflight, an errant lexicographer unguided by command of etymology and impelled by prejudice, but the most quoted authority in the book. Yet Jerome N. Frank, page 867, deplores the fact that Mr. Justice Benjamin N. Cardozo wrote "not in the current American idiom but in the 'King's English' of two hundred years ago." Fortunately a few heretics survive who believe that there is no such thing as "current American idiom" and that the language of the distinguished lawgiver Alfred the Great is the English language for all times and all places. His will, written before 900, is a model for all writers of testaments who have more courage — but perhaps less wisdom — than Chief Justice Edward Douglass White, who wrote, "All to my wife." More than seven hundred years after Alfred another great lawgiver, Sir Francis Bacon, wrote in a style that will endure. Three hundred years later and in our own century another excellent lawyer and author, John Galsworthy, never once quoted in the book, wrote in a style, neither English nor American, that is worthy of emulation. The language of Alfred and Bacon and Galsworthy is as wise and as wistful and as witty as that of Marshall and Wilson and Holmes.

Advocacy and the King's English was published by the Scribes, an association of attorneys who "love good English" and "seek to improve their power of persuasion." No cause is nobler.

Literature and the law have been allied from the beginning of time, the eminent peaks being Plato in Greece, and Sir Thomas More, Sir Francis Bacon, and John Galsworthy in England. The alliance has borne its greatest fruit at the famous law schools, or Inns of Court, of London: virtually all great authors from Chaucer, reputedly, to Galsworthy have ben associated with the Inns. Among the dramatics priorities of the Inns of Court are the first English tragedy, the first play in blank verse, the first play to use native legendary material, the first adaptation of a Greek Play, the first English prose comedy, and the first play to make use of the Arthurian legend. The bonds between the Inns of Court and the United States are close: the Middle Temple, one of the four schools, alone produced five signers of the Declaration of Independence, five of

those who adopted the Articles of Confederation, and six who signed the Constitution of the United States.

The book, unfortunately, is the product of job printing rather than of publishing. Bibliographical references are faulty. Quotation marks, particularly in relationship to other marks of punctuation have been abused. Misspelling spawn misspellings: *hum-drum, hinderance, heros, and gutteral,* ludicrous in context and in such a book, are but a few.

Although nearly every selection admonishes the need for organization, the arrangement of selections of writing of those "who have done superior legal writing" is regrettable. Although the table of contents does not so indicate, the material is divisible into three parts: documents and procedures at the trial level, documents and procedures at the appellate level, and the language of the law at both levels.

Some of the articles reek of the spontaneity, the witty artificial respiration, and the bouquet of the brandy of the after-dinner spech. Less good are the numerous ones "adopted" from Sydney Charles Schweitzer's three-volume *Trial Guide,* a legal pharmacopoeia the third volume of which has sizzled in every office for sixteen years. Even less good is the credit refrain, "This article was adapted from 3 Schweitzer. . .which was adapted from. . .Law Review." An adaptation of an adaptation is, indeed, an anti-missile.

With emphasis upon research, it is not pleasing to find the statement, ". . .the Frenchman was right who said that style is the man himself," when a glance at any book of quotations would have enabled the author to give credit to George de Buffon. It is disappointing that the Scribes advocate a "forcible" style. "English as She is Wrote" is inappropriately and tritely clad in a formal section called "The Use of English." One tires readily of "the first requisite" and "the first essential," and "courts do not operate in a vacuum." Even Jerome N. Frank raises doubt as to his meaning when he entitles an article "Some Reflections on Judge Learned Hand"; the reader wonders whether he has not fallen in with dissolute "American idiom" when he violates number: "He is one of the few living Americans. . .who has done so." One can readily accept the statement, "Lawyers are habitually vague," but not that of the same author, 455, "From a stylistic point of view, it is well occasionally to use. . .an unusual word which requires the court to stumble and stop for greater emphasis." It is not surprising that this author prefers as "an aid to clarity" what he calls "demonstrative evidence—charts, X-rays, skeletons." The foreword whispers that the attorney may acquire the status of "amicus curiae. . .by eschewing crowds of words." One law professor who goes to the mount to bewail the misspelling of his students admits that one cannot make "silk purses out of the ears of pigs — destroying the imagery and the adage itself. He, an ardent advocate of originality and clarity, also admits that there are "good and sufficient reasons" for admitting "marginal students" to "a good law school which will fail them out rather than turning them away into the hands of poor ones which will pass them." The beacon often consumes itself by its own brilliance. One author advocates the proofreading of briefs by a high school English teacher or a journalist! At times it appears that every attorney is looking for the language equivalent of *Trial Guide.* One who

can master the complexities of evidence will find a good friend in any of the many editions of the aging but correct *Advanced English Grammar* by Kittredge and Farley, published by Ginn and Company, in which most of the examples are from superior literature.

Advocacy and the King's English contains many excellent statements: "A lawyer is a professional man, in whom poor English should not be tolerated." The attorney is also admonished to minimize the use of *hereinbefore,* and *thereinafter* and to scale off Latin fossils. Another article says that "the robust Anglo-Saxon appeals more than does the Latin." Another author advises the disciplined attorney to avoid the promiscuous litigants named John Doe and Richard Roe, as well as "sentence inflation." "Language and the Law," 646-736, is an excellent article, although the average attorney, when he reads that we cannot adequately define *man* or *animal,* may be frustrated. The most ubiquitous and the most erotic contemporary goddess is Semantics. Every man of letter, every lawyer, and every libertine pays awesome lip-service to her without realizing that within himself he has as great power as she. So much has been so badly written about her that one defensively seeks the company of Francoise de Malherbe. On his deathbed Malherbe, harangued in very bad French by his confessor about the beauties of heaven, commanded, "Hold your tongue. Your wretched tongue only makes me hate them." The lawyer who is careful in his language as he is in his legal research will have no difficulty in speaking and writing correctly and convincingly. Free transportation is not provided to effective and eloquent language any more than it is to relevant statute or pertinent precedent.

In these days of sensational trials and Congressional investigations viewed by all the nation, in which the justice or the attorney or the investigator often appears to be less articulate, and even less intelligent, than the gangster, it is increasingly important for every man of law to achieve new dignity through the use of correct English and to reaffirm faith in the creed of the Scribes

Advocacy and the King's English is like an old friend, sometimes slipshod and sometimes shining, but always at hand for argument and consolation.

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Professor of English
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CLARK ON SURVEYING AND BOUNDARIES, 3rd EDITION

By John S. Grimes, Indianapolis: The Bobbs-Merrill Company, Inc. 1959. Pp. 1031. $12.50.

Mr. Grimes has done a remarkably able job in bringing the monumental *Clark on Surveying and Boundaries* up to date. This edition, like the first two, is an exhaustive and complete coverage of nearly all conceivable aspects of surveying and boundaries. The expansion and rearrangement of this edition makes it a needed and timely replacement for the second edition.

The subject matter has been rearranged to bring together connected subjects which in the older editions were spread throughout the book. The third edition, at the expense of some repetition, has given a more extensive coverage to the many side issues incident to the major topics. This change obviates the necessity for much time consuming search for information dealing with less significant correlated matters.

As the author states, there are no footnotes due to the policy employed of expanding the work without appreciably increasing the physical size of the volume. The footnotes in the second edition and the subsequent new material which formerly would have been footnotes of this edition have been incorporated into the text, though causing no impoverishment in completeness.

As a result of the incorporation into the third edition of case decisions and judicial trends subsequent to the second edition, the coverage given to the various subjects has been considerably expanded. The subjects of particularly noticeable expansion are: surveyor's rights and liabilities, progress of land surveys, highways, and water problems. Possibly the most important enlargement in the third edition is found in the treatment given highways. This enlargement is attributable to the tremendous growth of our highway system and the consequent boundary problems arising therefrom since 1939. This coverage alone would justify the new edition.

The most significant addition, in the area of new material, is the information derived from the 1947 *Manual for Surveyors*. This new matter brings the book up to date with regard to the present technical aspects of resurveys. The third edition also has three entirely new chapters under the titles of *Interests in Land, Tracking a Survey,* and *Reading Instruments in Conveyance*. One need only glance at the titles of these chapters to realize their value in a work of this nature.

The principal flaw in the third edition lies in the omission of judicial attitudes on the surveyor's cardinal sin of making erasures in field notes. Without a doubt, some mention of the pertinent court decisions and attitudes on this point would have increased the value of the work.

The third edition is a needed and worthy successor to the second edition and anyone connected with surveying and boundaries would do well to keep it close at hand.

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